Part 8 Government Regulation CHAPTER 24 Employment and Discrimination Law Page 575 CASE OPENER Brad Gets Fired from So Clean! Brad has worked in the marketing department of So Clean! for the past five years. So Clean! is a company that produces household cleaners. Brad is an excellent employee and was recently promoted. Shortly after his promotion, Brad decided to reveal publicly that he is homosexual. His family and most of his co-workers have been very supportive. Soon after his promotion and announcement that he is gay, Brad began having problems with his boss, Jennifer. She began asking Brad questions about his personal life. At first it was small things, such as asking Brad whether he was a smoker (he is, although only outside the workplace). Jennifer then began asking Brad very personal questions about his sexuality and told him she did not like weak men. The final straw for Brad occurred when Jennifer announced that she would cure his homosexuality and told him to come home with her that night after work or be fired. Jennifer was careful that there were never any witnesses around when she asked Brad personal questions or propositioned him. Brad refused Jennifer's advances and was fired. He filed an administrative complaint with the Equal Employment Opportunity Commission (EEOC) alleging wrongful termination, retaliation, sexual harassment, and sexual discrimination. Jennifer's response was that she fired Brad because of creative differences about how to run the marketing department and because he is a smoker. Jennifer denied Brad's accusations about sexual discrimination and harassment. May an employer discriminate against an employee because he is gay? May an employer fire an employee because the employee smokes outside the workplace? May a man file a claim of sexual discrimination? Sexual harassment? What defenses does an employer have to a charge of discrimination? LEARNING OBJECTIVES LO 24-1 Describe at-will employment. LO 24-2 Understand what happens when an employee quits an at-will job. LO 24-3 Outline the federal laws governing employment discrimination. LO 24-4 Describe the legal requirements for a charge of sexual discrimination or sexual harassment. LO 24-5 Identify the categories of people protected from discrimination. LO 24-6 Summarize the laws that protect employees' wages, benefits, health and safety standards, and rights. LO 24-7 Identify components of employer privacy policies. LO 24-8 Recognize the circumstances under which social media may be used in employment decisions. LO 24-9 Recall the agency and legislation that regulates the hiring of foreign workers. LO 24-10 List the three major pieces of labor legislation.

When May an Employee Be Fired? LO 24-1 Describe at-will employment. During the eighteenth and nineteenth centuries in the United States, employees had no protection in the workplace. An employee who was injured could be fired. In fact, an employer could fire a worker for no reason at all. This concept came to be known as at-will employment.1 At-will employment applied in all states with no exceptions until 1959.2 Today, any employee who is not employed under a contract for a set duration or under a collective bargaining agreement is considered an at-will employee.3 This means that the employee may quit at any time for any reason or no reason at all, with no required notice to the employer.4 Similarly, an employer may fire the employee at any time, with no notice, for almost any reason. For example, your employer could decide they don't like the color of your shirt and fire you on the spot! The exception to the at-will rule is that an employer may not fire an employee for an illegal reason. What is an illegal reason? Broadly, any termination based on a violation of a state statute, a state constitution, a federal law, the U.S. Constitution, or a public policy is illegal. Exceptions to at-will employment have also been found through breaches of implied contracts with employees that were based on employee handbooks.5

When May an Employee Quit? Special Considerations for Those Who Depart Their Companies to Become Entrepreneurs LO 24-2 Understand what happens when an employee quits an at-will job. At-will employment means that an employee may quit for any reason or no reason at all. However, if you are a key employee (e.g., officer, director, manager) or a skilled employee (e.g., software engineer, marketing specialist), you owe a duty of loyalty to your current company.6 While employed by the company you may not do anything that would harm your employer, including operating a business that competes with your employer or that usurps any business opportunities your employer may be interested in. While it may be tempting to stay with your current employer while setting up your new business, know when it is time to quit and protect the interests of your new business. Additionally, you may not solicit co-workers to work for the new business. Even after you quit working for your employer, if you solicit employees from your former company, you may be held liable if your conduct leads those co-workers to violate any applicable restrictive covenants (for example, a covenant not to compete or a nondisclosure agreement). State laws vary, but when in doubt, talk to an attorney who specializes in business and employment law.

Federal Employment Discrimination Laws Governing Employers LO 24-3 Outline the federal laws governing employment discrimination. Employees are protected in the workplace by a number of both federal and state laws. Federal laws apply to everyone in the United States. Federal laws may be described as a minimum level of protection for all workers. State laws may give employees more, but not less, protection than federal laws. Exhibit 24-1 is an overview of some of the most important federal employment discrimination laws. Exhibit 24-1Federal Discrimination Laws FEDERAL LEGISLATION PURPOSE Civil Rights Act (CRA) of 1964—Title VII (as amended by the Civil Rights Act of 1991) Protects employees against discrimination based on race, color, religion, national origin, and sex; also prohibits harassment based on the same protected categories Pregnancy Discrimination Act (PDA) of 1978 Amends Title VII of the CRA, expanding the definition of sex discrimination to include discrimination based on pregnancy Age Discrimination in Employment Act (ADEA) of 1967 Prohibits employers from refusing to hire, discharging, or discriminating in terms and conditions of employment on the basis of an employee or applicant being age 40 or older Americans with Disabilities Act (ADA) of 1990 (as amended in 2008) Prohibits discrimination against employees and job applicants with disabilities Equal Pay Act of 1963 Prohibits an employer from paying workers of one gender less than the wages paid to employees of the opposite gender for work that requires equal skill, effort, and responsibility

Civil Rights Act—Title VII The Civil Rights Act is divided into sections, called titles. Title VII of the Civil Rights Act (CRA) of 1964 deals with discrimination in employment. It prohibits employers from hiring, firing, or otherwise discriminating in terms and conditions of employment, and it prohibits segregating employees in a manner that would affect their employment opportunities on the basis of their race, color, religion, sex, or national origin. There are two ways to prove discrimination under Title VII—disparate treatment and disparate impact. Title VII of CRA applies to employers who have 15 or more employees for 20 consecutive weeks within one year and who are engaged in a business that affects commerce. The U.S. government, corporations owned by the government, agencies of the District of Columbia, Indian tribes, private clubs, unions, and employment agencies are also covered by Title VII of CRA. Disparate-Treatment Discrimination under Title VII To sue for disparate treatment under Title VII, the plaintiff must be a member

of a protected class as listed in CRA. In other words, the employee must have been discriminated against on the basis of race, color, national origin, religion, or sex (i.e., gender). If the employee has been refused work, fired, denied a promotion, or the like, based on membership in a protected class, this is a form of intentional discrimination and qualifies the employee to sue for disparate-treatment discrimination. Proving disparate-treatment discrimination in employment under Title VII is a three-step process: Page 578 Plaintiff (the employee) must demonstrate a prima facie case of discrimination. Defendant (the employer) must articulate a legitimate, nondiscriminatory business reason for the action. Plaintiff (the employee) must show that the reason given by the defendant (the employer) is a mere pretext.7 Page 579 After all the evidence has been presented, the trier of fact (a jury in most cases) must decide whether discrimination has occurred.8 The burden of proof in a civil case is preponderance of the evidence (i.e., more likely than not). If the jury finds in favor of the plaintiff-employee, damages must be assessed. Damages under Title VII of CRA include up to two years of back pay, compensatory damages, punitive damages (limited in some cases), attorney fees, court costs, court orders (including reinstatement), and remedial seniority. If the jury finds in favor of the defendant-employer, the plaintiff-employee receives nothing. CASE Nugget Must an Employer Reasonably Accommodate an Employee’s Religious Practices? Kumar v. Gate Gourmet, Inc. Supreme Court of Washington 2014 Wash. LEXIS 387 (May 22, 2014) The plaintiffs in this action (the employees) work near SeaTac airport for the defendant, Gate Gourmet, preparing meals for service on trains and airplanes. Due to security concerns, the employees can neither bring food with them to work nor leave the premises to obtain food during their 30-minute lunch break. Instead, Gate Gourmet provides meals for employees to consume during their break. These meals ostensibly consist of one vegetarian and one meat-based main dish. The employees allege, however, that Gate Gourmet uses animal by-products in the vegetarian option. They also allege that they informed Gate Gourmet that their various religious beliefs prohibited them from eating the beef-pork meatballs the company served, that Gate Gourmet responded by temporarily switching to turkey meatballs, that the company later switched back to the beef-pork mixture without notifying the employees, and that it now refuses to alter the employee meals. The employees brought a class action against the employer, challenging the employer’s meal policy, which barred employees from bringing in their own food for lunch (for security reasons), leaving only employer-provided food for the employees to eat. The employees claimed that the meal policy constituted a failure to

accommodate their religious practices reasonably, had a disparate impact on employees who adhered to certain religions, and constituted battery and negligent infliction of emotional distress. The trial court dismissed the case, holding that there was no requirement to “reasonably accommodate” the employees’ religious practices under Washington state law. The decision was affirmed by the appellate court. Upon review by the Washington Supreme Court, the lower court decision was reversed. The Washington Supreme Court stated that under state rules of statutory interpretation and persuasive federal antidiscrimination case law (Title VII), the Washington Law Against Discrimination (WLAD) implies a requirement to accommodate religious practices reasonably. Moreover, both the disparate-impact and religious-accommodation doctrines bar facially neutral employment policies that have disproportionate adverse effects on a protected class. Disparate-Impact Discrimination under Title VII Disparate-impact cases are sometimes called unintentional-discrimination cases. Although it is very difficult to prove disparate treatment, it is even more difficult to prove disparate impact. Disparate-impact cases arise when a plaintiff attempts to establish that although an employer’s policy or practice appears to apply to everyone equally, its actual effect is that it disproportionately limits employment opportunities for a protected class. The plaintiff proves a case based on disparate impact by first establishing statistically that the rule disproportionately restricts employment opportunities for a protected class. The burden of proof then shifts to the defendant, who can avoid liability by demonstrating that the practice or policy is a business necessity. The plaintiff, at this point, can still recover by proving either that the necessity was promulgated as a pretext for discrimination or that an alternative employment practice had less discriminatory effect and the employer failed to adopt such practice. Exhibit 24-2Disparate Treatment and Disparate Impact Burden Shifting The initial steps for proving a prima facie case of disparate impact were set forth in Griggs v. Duke Power Co.9 In that case, the employer-defendant required all applicants to have a high school diploma and a successful score on a professionally recognized intelligence test for all jobs except laborer. The stated purpose of these criteria was to upgrade the quality of the workforce. The plaintiff statistically demonstrated the discriminatory impact by showing that 34 percent of the white males in the state had high school diplomas, whereas only 12 percent of the Black males did, and by introducing evidence from an EEOC study showing that 58 percent of the whites, compared to 6 percent of the Blacks, had passed tests similar to the one given by the defendant. Because the defendant could not demonstrate any business-related justification for either employment policy,

the plaintiff was successful. Requiring a high IQ or high school or college diploma may be necessary for some jobs, but not for all jobs at Duke Power. Page 580 Sexual Harassment under Title VII Harassment first developed in the context of discrimination based on sex, and it evolved to become applicable to other protected classes. The definition of sexual harassment stated in the Equal Employment Opportunity Commission (EEOC) guidelines and accepted by the U.S. Supreme Court is “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” that implicitly or explicitly makes submission a term or condition of employment; makes employment decisions related to the individual dependent on submission to or rejection of such conduct; or has the purpose or effect of creating an intimidating, hostile, or offensive work environment. In the Case Opener, did the actions of Jennifer create a sexually hostile environment for Brad? Two distinct forms of sexual harassment are recognized. The first, and generally easiest to prove, is quid pro quo, which occurs when a supervisor makes a sexual demand on someone and this demand is reasonably perceived as a term or condition of employment. The second form of sexual harassment involves the creation of a hostile work environment. Case 24-1 demonstrates how the “totality of circumstances” standard is applied to determine whether an employer’s conduct has created a hostile work environment. CASE 24-1 BRENNAN V. TOWNSEND & O’LEARY ENTERPRISES, INC. Court of Appeals of California, Fourth Appellate District 199 Cal. App. 4th 1336 (2011) FACTS: Plaintiff Stephanie Crowley Brennan sued her employer for sexual harassment. At trial, plaintiff testified that an August 2004 email was the only incident of harassment based on her gender directed at her. Although the August 2004 email, which referred to plaintiff as a “big-titted, mindless one” (although it did not mention her by name), was rude, insulting, and unprofessional, the record shows it was an isolated event as there was no evidence that the sender (or any employee of the agency) made any other derogatory remarks about plaintiff, sex based, or otherwise, in any other context. The evidence showed the email was not intended to be shared publicly. Instead, it was indisputably intended to have been only sent to one person. Plaintiff saw the August 2004 email only after it was inadvertently forwarded to another employee, who in turn forwarded it to plaintiff. Plaintiff was a vice-president of the agency at the time of the August 2004 email, and the author of the email was never her supervisor. A jury found that plaintiff was subjected to severe or pervasive harassment based on her gender, in violation of Gov. Code, § 12940, of the Fair Employment and Housing Act. The Superior Court of Orange County, California, granted defendant employer’s motion for judgment notwithstanding the verdict, and

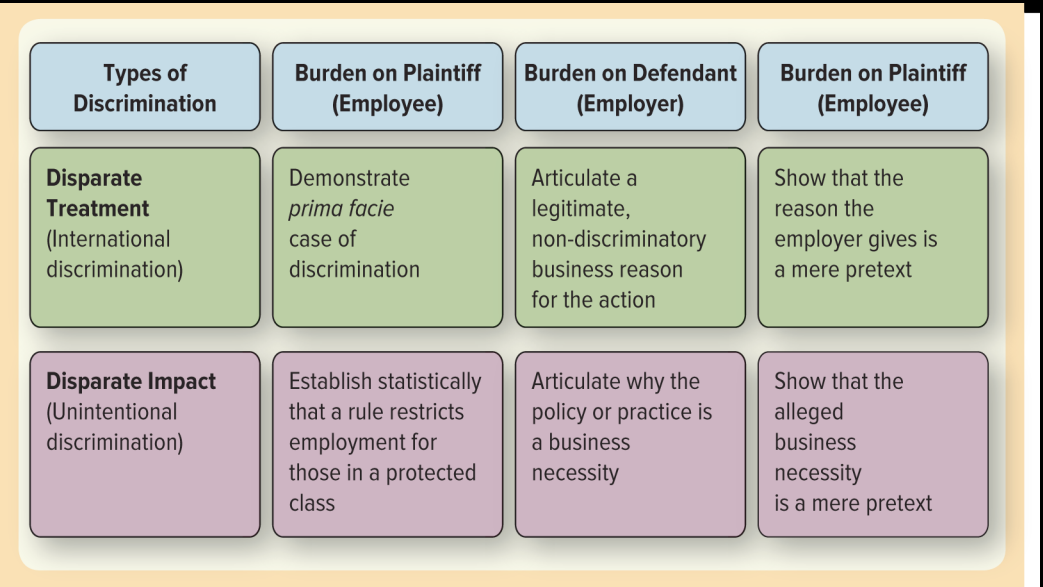
the employee appealed. ISSUE: Whether a single email that was inadvertently forwarded to plaintiff may constitute hostile environment sexual harassment under the “totality of the circumstances” test? REASONING: Like federal law, California law prohibits sexual harassment in the workplace. With respect to sexual harassment in the workplace, the prohibited conduct ranges from expressly or impliedly conditioning employment benefits on submission to, or tolerance of, unwelcome sexual advances to the creation of a work environment that is hostile or abusive to employees because of their sex. Thus, similar to the federal law’s Title VII, California’s FEHA recognizes two theories of liability for sexual harassment claims, quid pro quo harassment, where a term of employment is conditioned upon submission to unwelcome sexual advances and hostile work environment, where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment. In construing California’s FEHA, this court has held that the hostile work environment form of sexual harassment is actionable only when the harassing behavior is pervasive or severe. This limitation mirrors the federal courts’ interpretation of Title VII. To prevail on a hostile work environment claim under California’s FEHA, an employee must show that the harassing conduct was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. There is no recovery for harassment that is occasional, isolated, sporadic, or trivial. Courts that have construed federal and California employment discrimination laws have held that an employee seeking to prove sexual harassment based on no more than a few isolated incidents of harassing conduct must show that the conduct was severe in the extreme. A single harassing incident involving physical violence or the threat thereof may qualify as being severe in the extreme. Under California’s FEHA, as under the federal law’s Title VII, the existence of a hostile work environment depends upon the totality of the circumstances. In evaluating the totality of the circumstances to determine the existence of a hostile work environment, the following factors can be considered: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred. In determining what constitutes sufficiently pervasive harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine,

or a generalized nature. We begin our analysis by observing the trial evidence did not support a finding plaintiff was ever subjected to severe sexual harassment. Neither the August 2004 email nor any evidence at trial showed plaintiff was ever assaulted, subjected to “unwelcome physical contact,” threatened, propositioned, or subjected to explicit language directed at her or at anyone else in her presence. As plaintiff acknowledged in her own testimony, the August 2004 email was the only sexual harassment she claims she directly experienced up to that time. Evidence of the August 2004 email, even when coupled with evidence of the few other sporadic claimed incidents of sexual harassment she witnessed over the years, her conversations with Steve O’Leary about her personal life, and her discovery of other incidents of sexual harassment that did not occur in her presence or immediate work environment, is insufficient as a matter of law to establish the existence of pervasive harassment based on gender. DECISION AND REMEDY: Judgment for defendant is affirmed. SIGNIFICANCE: To be actionable as hostile environment sexual harassment, plaintiff must be able to show a pattern of offensive and/or abusive conduct that is severe and pervasive. An isolated incident, unless extremely severe, is insufficient to support a claim of hostile environment sexual harassment. CRITICAL THINKING Identify the Court’s reasons for its finding. Do you think these reasons were sufficient for the court to uphold the lower court’s judgment notwithstanding the [jury’s] verdict? Why or why not? ETHICAL DECISION MAKING Imagine that the judge is operating under a duty-based system of ethics. What duty is she advocating in terms of employer-employee relationships? Would this ruling serve well as a universal standard? Page 581 LO 24-4 Describe the legal requirements for a charge of sexual discrimination or sexual harassment. Same-Sex Harassment—The Supreme Court Speaks Initially, same-sex harassment was not covered under CRA. By 1997, however, the courts were split on the issue. This issue was resolved in 1998 in Oncale v. Sundowner Offshore Services, Inc.10 Oncale, a male, was forcibly subjected to sex-related, humiliating actions against him by other male employees. He was physically sexually assaulted and threatened with rape. He complained, to no avail, so he filed a lawsuit alleging discrimination based on sex. The district court granted a motion for summary judgment for the defendant employer, holding that a male had no cause of action under Title VII for harassment by male co-workers. The case was appealed to the U.S. Supreme Court, which concluded that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII. The Court reversed the appellate court’s order and remanded the case for further proceedings. Harassment by Nonemployees under Title VII Employers may be held liable

for harassment of their employees by nonemployees under very limited circumstances. If an employer knows that a customer repeatedly harasses an employee yet the employer does nothing to remedy the situation, the employer may be liable. For example, in Lockhard v. Pizza Hut, Inc., the franchise was held liable for the harassment of a waitress by two male customers because no steps had been taken to prevent the harassment.11 Page 582 Harassment of Other Protected Classes Under Title VII Hostile-environment issues have also been used in cases of discrimination based on religion and race. For example, in a 1986 case, Snell v. Suffolk County, Hispanic and Black corrections workers demonstrated that a hostile work environment existed by proving that they had been subjected to continuing verbal abuse and racial harassment by co-workers and that the county sheriff's department had done nothing to prevent the abuse.12 The white employees had continually used racial epithets and posted racially offensive materials on bulletin boards, such as a picture of a Black man with a noose around his neck, cartoons favorably portraying the Ku Klux Klan, and a "Black officers' study guide," consisting of children's puzzles. White officers once dressed a Hispanic inmate in a straw hat, sheet, and sign that said "spic." Such activities were found by the court to constitute a hostile work environment. Pregnancy Discrimination Act of 1978—An Amendment to Title VII In 1987, Title VII was amended by the Pregnancy Discrimination Act (PDA). This law expanded the definition of discrimination based on gender to include discrimination based on pregnancy. "Discrimination on the basis of pregnancy, childbirth or related medical conditions constitutes unlawful sex discrimination under Title VII."13 Under the act, temporary disability caused by pregnancy must be treated the same as any other temporary disability. Defenses to Claims under Title VII As a business owner or manager, how would you respond if one of your employees filed a lawsuit under Title VII? Are there any legal exceptions for discriminating against a protected class? The answer, surprising to many business owners and managers, is yes. The three most important defenses available to defendants in Title VII cases are the bona fide occupational qualification, merit, and seniority system defenses. These defenses are raised by the defendant after the plaintiff has established a prima facie case of discrimination based on either disparate treatment or disparate impact. They would obviously not be applicable to a claim based on harassment. The Bona Fide Occupational Qualification Defense The bona fide occupational qualification (BFOQ) defense allows an employer to discriminate in hiring on the basis of sex, religion, or national origin (but not race or color) when doing so is necessary for the performance of the job. Necessity must be based on actual qualifications, not stereotypes

about one group’s abilities. For example, being a male cannot be a BFOQ for a job simply because it is a dirty job, although there may be a valid requirement that an applicant be able to lift a certain amount of weight if such lifting is part of the job. Conversely, being a female may be a BFOQ for modeling female clothing. An employer would not be required or expected to hire a male for such a job. Employer arguments about inconvenience to the employer, such as having to provide two sets of restroom facilities, have not been persuasive in the courts. Nor have customer preferences to be served by a particular gender or nationality. The only exception to customer preference is sexual privacy (e.g., female restroom attendants in the women’s restroom and male attendants in the men’s room).14 The Merit Defense The merit defense is usually raised when hiring or promotion decisions are partially based on test scores. Professionally developed ability tests that are not designed, intended, or used to discriminate may be used. Although these tests may have an adverse impact on a class, as long as they are manifestly related to job performance, they do not violate the act. Since 1978, the “Uniform Guidelines on Employee Selection Procedures” (UGESP) resource has guided government agencies charged with enforcing civil rights, and they provide guidance to employers and other interested persons about when ability tests are valid and job-related. Under these guidelines, tests must be validated in accordance with standards established by the American Psychological Association. Page 583 Three types of validation are acceptable: (1) criterion-related validity, which is the statistical relationship between test scores and objective criteria of job performance; (2) content validity, which isolates some skill used on the job and directly tests that skill; and (3) construct validity, wherein a psychological trait needed to perform the job is measured. A test that required a word processor to use a computer would be content-valid. A test of patience for a teacher would be construct-valid. The Seniority System Defense A bona fide seniority system is a legal defense under Title VII. Even though a seniority system, in which employees are given preferential treatment based on their length of service, may perpetuate past discrimination, such systems are considered bona fide and are thus not illegal if (1) the system applies equally to all persons; (2) the seniority units follow industry practices; (3) the seniority system did not have its genesis in discrimination; and (4) the system is maintained free of any illegal discriminatory purpose. Remedies under Title VII A plaintiff may seek both equitable and legal remedies for violations of Title VII. Courts have ordered parties to engage in diverse activities ranging from publicizing their commitment to minority hiring to establishing special training programs for minorities. A successful plaintiff may recover back pay for up to two years

from the time of the discriminatory act. A plaintiff who was not hired for a job because of a Title VII violation may also receive remedial seniority dating back to the time when the plaintiff was discriminated against; compensatory damages, including those for pain and suffering; and, in some cases, punitive damages. In cases based on discrimination other than race, however, punitive damages are capped at $300,000 for employers of more than 500 employees, $100,000 for firms with 101 to 200 employees, and $50,000 for firms with 100 or fewer employees. An employer will not be held vicariously liable for punitive damages as long as it made good-faith efforts to comply with federal law. Attorney fees may be awarded to a successful plaintiff in Title VII cases. They are typically denied only when special circumstances would render the award unjust. If it is determined that the plaintiff's action was frivolous, unreasonable, or without foundation, the courts may award attorney fees to the prevailing defendant. For more information on Title VII, visit the EEOC website at www.eeoc.gov. Procedure for Filing a Claim under Title VII Filing a claim under Title VII is much more complicated than simply filing a lawsuit. Failure to follow the proper procedures within the strict time framework may result in the plaintiff losing his or her right to file a lawsuit under Title VII. The first step in initiating a Title VII action is for the aggrieved party to file a charge with the state Equal Opportunity Commission or, if no such agency exists, the federal EEOC. A charge is a sworn statement that states the name of the charging party, the name(s) of the defendant(s), and the nature of the discriminatory act. Title VII charges must be filed with the EEOC within 180 days of the alleged discriminatory act. Within 10 days of receiving the charge, the EEOC must notify the alleged violator of the charge. Then the EEOC investigates the matter to determine whether there is reasonable cause to believe that a violation has occurred. If the EEOC does find such reasonable cause, it attempts to eliminate the discriminatory practice through conciliation, that is, by trying to negotiate a settlement between the two parties. If unsuccessful, the EEOC may file suit against the alleged discriminator in federal district court. Failure to file suit does not necessarily mean that the EEOC thinks the plaintiff does not have a valid claim; the EEOC may simply feel that the claim is not the type it wishes to use its limited resources on pursuing. If the EEOC decides not to sue, it notifies the plaintiff of his or her right to file an action and issues the plaintiff a right-to-sue letter, which is not intended to be anything other than a statement that the plaintiff has followed the proper initial procedures and therefore may file a lawsuit. The plaintiff must have this letter to file a private action.



Types of Discrimination	Burden on Plaintiff (Employee)	Burden on Defendant (Employer)	Burden on Plaintiff (Employee)
Disparate Treatment (International discrimination)	Demonstrate *prima facie* case of discrimination	Articulate a legitimate, non-discriminatory business reason for the action	Show that the reason the employer gives is a mere pretext
Disparate Impact (Unintentional discrimination)	Establish statistically that a rule restricts employment for those in a protected class	Articulate why the policy or practice is a business necessity	Show that the alleged business necessity is a mere pretext

May an Employer Discriminate on the Basis of Sexual Orientation and/or Gender Identity? Up until 2020, there was no federal law that prohibited widespread workplace discrimination based on sexual orientation or gender identity—the decision was left to the individual states. At that point in time, a total of 22 states had laws protecting against discrimination based on sexual orientation and/or gender identity.15 Meanwhile, several cases winding their way through the federal courts were tackling the issue of whether the word "sex" in Title VII of the Civil Rights Act of 1964, should be interpreted to include sexual orientation. In other words, did prohibiting discrimination "based on sex" include more than just gender? In the following Case 24-2, the U.S. Supreme Court was tasked with determining whether complaints for sexual orientation and/or gender identity discrimination are, by definition, also claims for sex discrimination as defined in Title VII of the Civil Rights Act of 1964. CASE 24-2 BOSTOCK v. CLAYTON COUNTY, GEORGIA United States Supreme Court 140 S. Ct. 1731 (2020) FACTS: In each of these cases, an employer allegedly fired a long-time employee simply for being homosexual or transgender. Clayton County, Georgia, fired Gerald Bostock for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. Altitude Express fired Donald Zarda days after he mentioned being gay. And R. G. & G. R. Harris Funeral Homes fired Aimee Stephens, who presented as a male when she was hired, after she informed her employer that she planned to "live and work full-time as a woman." Each employee sued, alleging sex discrimination under Title VII of

the Civil Rights Act of 1964 . . . The employers do not dispute that they fired their employees for being homosexual or transgender. Rather, they contend that even intentional discrimination against employees based on their homosexual or transgender status is not a basis for Title VII liability. The employers contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. But legislative history has no bearing here, where no ambiguity exists about how Title VII's terms apply to the facts. While it is possible that a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context, the employers do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964 or that the statute's terms ordinarily carried some missed message. Instead, they seem to say when a new application is both unexpected and important, even if it is clearly commanded by existing law, the Court should merely point out the question, refer the subject back to Congress, and decline to enforce the law's plain terms in the meantime. This Court has long rejected that sort of reasoning. And the employers' new framing may only add new problems and leave the Court with more than a little law to overturn. Finally, the employers turn to naked policy appeals, suggesting that the Court proceed without the law's guidance to do what it thinks best. That is an invitation that no court should ever take up. ISSUE: Whether Title VII of the Civil Rights Act of 1964 bans discrimination against employees based on their homosexual or transgender status? REASONING: Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids. Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and

extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit. Few facts are needed to appreciate the legal questions we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that they are homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status. This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extra-textual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations. With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law . . . From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees." DECISION AND REMEDY: Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on

an employee’s sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law. NOTE: Justice Gorsuch delivered the opinion of the Court. The decision in this case was 6-3, Justice Alito (with whom Justice Thomas joins) dissenting; and Kavanaugh dissenting. CRITICAL THINKING Do you think that the legislative intent at the time CRA of 1964 was drafted should dictate the Court’s Opinion? Or do you agree with Justice Gorsuch’s textualist approach? ETHICAL DECISION MAKING Do you agree with the Court’s decision? Should there be an exception for religious organizations? Why or why not?

Discrimination Based on Marriage On June 26, 2015, in a historic 5-4 ruling, the Supreme Court of the United States found bans on marriage equality to be unconstitutional—and that the right to marriage is a fundamental right for everyone. Prior to the Supreme Court’s ruling in Obergefell v. Hodges, a same-sex couple could marry in a state where such unions were legal, but if they moved to a state that did not recognize same-sex marriage, they were legally treated as if their marriage did not exist.16 This was because of section 2 of the Defense of Marriage Act (DOMA), a federal law passed in 1996 providing that no state “shall be required to give effect” to same-sex marriages granted by other states. As a result, some states chose to recognize same-sex marriage, and other states chose not to. The Supreme Court’s 2015 ruling struck down section 2 of DOMA, effectively ending the unequal treatment of the marriages of same-sex couples. Same-sex couples are now able to exercise the right to marry in all states, and there is no longer any basis for any state to refuse to recognize lawful same-sex marriages performed in other states. Importantly, the majority opinion of the Supreme Court held as follows: Under the Due Process Clause of the Fourteenth Amendment, no state shall deprive any person of life, liberty, or property, without due process of law. The fundamental liberties protected by this clause include most of the rights enumerated in the Bill of Rights. In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. In interpreting the Equal Protection Clause, the U.S. Supreme Court has recognized that new insights and societal understandings can reveal unjustified inequality within the United States’ most fundamental institutions that once passed unnoticed and unchallenged. Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples have a fundamental right to marry.

Age Discrimination in Employment Act of 1967 LO 24-5 Identify the categories of people protected from discrimination. The Age Discrimination in Employment Act (ADEA) of 1967 was enacted to prohibit employers from refusing to hire, discharging, or discriminating in terms and conditions of employment against employees or applicants age 40 or older. The language describing the prohibited conduct is virtually the same as that of Title VII, except that age is the prohibited basis for discrimination. ADEA applies to employers having 20 or more employees. In Case 24-3 below, the jury had to decide whether there was substantial evidence to prove that the defendants' conduct was motivated by age discrimination and not by a justified business reason. CASE 24-3 Bobby Dean Nickel v. Staples Contract & Commercial Inc. 140 S. Ct. 1731 (2020) FACTS: Plaintiff had worked for Corporate Express, an office-supplies company catering to businesses, for seven years when Staples Inc. purchased Corporate Express in June 2008 and renamed the company Staples Contract and Commercial Inc. Plaintiff's job was to manage the physical plant at the Corporate Express fulfillment facility in La Mirada. His duties included general repair and maintenance, equipment maintenance, and security. Plaintiff maintained this supervisory position after Staple's Inc.'s takeover of Corporate Express. In 2007, Plaintiff began reporting to a new manager, Lionel Marrero. After the 2008 takeover, Marrero worked for Defendants. There was evidence at trial that Marrero was on a mission to cut costs at the La Mirada facility by replacing older, higher-paid employees with part-time and temporary employees. His method was to increase the workload for older employees, forcing them into retirement, or "[write] them up" for errors or ethical violations, creating a basis for their termination. In 2011, when Plaintiff was 64 years old, Defendants terminated Plaintiff's employment based on allegations that he stole a bell pepper from the La Mirada facility's cafeteria, which was run by a third-party vendor. Plaintiff explained that he entered the cafeteria after hours to evaluate whether the refrigerators were working properly. When he opened the fridge, a salad fell out onto the floor. Plaintiff threw out the salad but ate the bell pepper. He testified in his deposition and at trial that there was an accepted practice of taking food from the cafeteria after hours and paying for it later. When he was investigated for the theft, Plaintiff reported that he had previously taken three Monster drinks after hours and subsequently paid for them. A cafeteria worker likewise told company investigators that she noticed the drinks missing and that Plaintiff had paid for them. Plaintiff initially stated in a written statement that he forgot to pay for the 68-cent

bell pepper but later testified at his deposition and at trial that he did pay for the pepper. Following his termination, Plaintiff filed this lawsuit against Defendants, alleging age-based discrimination. Plaintiff tried his age discrimination claim to a jury, who found in his favor and awarded him approximately $3.2 million in compensatory damages and $22.8 million in punitive damages ($13,053,664 against Staples and $9,790,248 against Staples Inc.). Defendants filed motions for new trial and for judgment notwithstanding verdict. Partially granting Staples Inc.'s motion for judgment, the court reduced punitive damages to $13 million by striking the punitive damages against Staples Inc. The court entered judgment jointly against Defendants in the amount of $16,317,080. ISSUE: The court examined whether there was insufficient evidence of discrimination to support the jury's verdict given defendants' assertions of a legitimate, nondiscriminatory business reason for the firing (i.e., alleged theft and unethical behavior)? REASONING: Defendants argue they were entitled to judgment notwithstanding the verdict because Plaintiff failed to present sufficient evidence that age was a substantial factor motivating his termination. FEHA prohibits age discrimination by employers against employees. A plaintiff alleging disparate treatment discrimination has the burden to establish unlawful discrimination by showing that he was a member of the protected age group, he competently performed his job, he was terminated or suffered an adverse employment action, and there was a discriminatory motive for the termination. As to the last prong, "[t]here must . . . be evidence of a causal relationship between the [discriminatory] animus and the adverse employment action." If the employer shows that its action was taken for a legitimate, nondiscriminatory reason, the plaintiff must show that the employer's reason for termination was pretextual. Specifically, Defendants contend that there is insufficient evidence of discriminatory animus and persuasive evidence that Defendants based the termination on a legitimate, nondiscriminatory reason: Plaintiff's unethical behavior and violation of the anti-theft policy. We reject Defendants' argument that there was a dearth of evidence Plaintiff was fired because of his age. Based on testimony from Daniel Velasquez, Plaintiff, and other employees, the jury could reasonably find that Marrero was motivated by anti-age animus and Marrero's role in the decision to terminate Plaintiff was a substantial factor causing the termination. Marrero's comments about older employees, made in the context of an intention to eliminate them from the workforce, provided substantial evidence of age-based animus. Plaintiff elicited testimony from Velasquez, a former Staples manager who worked with Plaintiff prior to and at the time of his termination. Velasquez testified he had witnessed a

“concerted attempt to get rid of the higher paid, older workers” following Defendants’ takeover. In management meetings, Velasquez heard Marrero talk about the company’s desire to push out older employees and heard Marrero say he wanted to find reasons to discharge them. Specifically, Marrero told the managers to “[t]ake a closer look at the older people. They are starting to drag and are slowing down. If they are not top performers, write them up and get rid of them.” Marrero also said, “[w]e need young energetic people. Walk around the facility with the older workers and if they cannot keep up then get rid of them.” Plaintiff also testified that Marrero made similar ageist comments at managers’ meetings. Former employees also testified that they and their co-workers were pushed out of their jobs as a result of this discriminatory animus. The testimony of witnesses Velasquez, Vance, Munoz, and Evans provided substantial evidence of Marrero’s discriminatory comments and Defendants’ practice of forcing out older workers. This testimony provided ample evidence supporting the court’s finding there was substantial evidence of discrimination. DECISION AND REMEDY: The judgment is affirmed on all grounds. Plaintiff Bobby Dean Nickel is awarded his costs on appeal. SIGNIFICANCE: Despite defendants’ protestations that plaintiff was fired for a legitimate, nondiscriminatory reason (theft and unethical behavior), the jury had the right, based on the substantial evidence presented at trial, to reject defendants’ reasons and determine that the firing was based on age discrimination. CRITICAL THINKING Do you believe that plaintiff’s alleged theft of a bell pepper should constitute sufficient grounds for termination absent any evidence of discrimination? Does your opinion change when presented with the additional evidence of age discrimination? Why or why not? ETHICAL DECISION MAKING What social values are protected in the court’s decision? Do you agree with the court’s decision to protect these values?

Americans with Disabilities Act The goal of the Americans with Disabilities Act (ADA) is preventing employers from discriminating against employees and applicants with disabilities. ADA attempts to attain this objective by requiring employers to make reasonable accommodations to the known physical or mental disabilities of an otherwise qualified person with a disability, unless the necessary accommodation would impose an undue burden on the employer’s business. When the ADA was before Congress, some members predicted a flood of lawsuits that would bankrupt or at least

overburden business. . . . Studies have shown, however, that businesses have adapted to the ADA much more easily—and inexpensively—than the doomsayers predicted. . . . [One] survey found that three-quarters of all changes cost less than $100. Moreover, the predicted flood of lawsuits proved to be imaginary. Almost 90 percent of the cases brought before the Equal Employment Opportunity Commission are thrown out. The American Bar Association recently conducted a survey and learned that, of the cases that actually go to court, 98 percent are decided in favor of the defendants, usually businesses.17 ADA is enforced by the EEOC in the same way that Title VII is enforced. To bring a successful claim under ADA, the plaintiff must show that they meet all of the following: Had a disability. Was otherwise qualified for the job. Suffered an adverse employment decision because of that disability. Remedies for ADA violations are similar to those available under Title VII. A successful plaintiff may recover reinstatement, back pay, and injunctive relief. In cases of intentional discrimination, limited compensatory and punitive damages are also available. An employer who has repeatedly violated the act may be subject to fines of up to $100,000.

May an Employer Discriminate against a Smoker? In the Case Opener, Jennifer discovered that Brad was a smoker. Later, she fired him. One of Jennifer's given reasons for terminating Brad's employment was that he was a smoker. May Jennifer and So Clean! legally fire an employee for smoking outside the workplace? The answer is, "It depends!" A recent trend has been for employers to consider a potential employee's lifestyle when deciding whether to hire that person. Employers argue that smokers have higher health care costs and miss more work, lowering productivity. Page 589 As a result, some companies either won't hire smokers or are threatening to fire current employees who will not or are unable to quit smoking. In 2005, Michigan-based Weyco Inc. announced that it would terminate all workers who did not stop smoking.18 Many states have passed laws preventing companies from engaging in such action. If Brad works in Michigan, Jennifer and So Clean! may legally terminate him for smoking outside the workplace. Conversely, if Brad works in the District of Columbia or any of the 29 states with smoker's rights laws, he could not be legally terminated for smoking outside the workplace.19 Finally, employers should be aware that giving breaks on health care plans to employees who are nonsmokers could be in violation of a smoker's rights law.

Equal Pay Act of 1963 Although we generally think of Title VII as the primary means of protecting women from discrimination, an earlier law actually was designed specifically to protect women from wage discrimination: the Equal Pay Act (EPA) of 1963. When EPA was passed, the average wages of women were less than 60 percent of those of men. The primary purpose of the law was to eliminate situations in which women, working alongside men or replacing men, would be paid lower wages for doing substantially the same job. EPA prohibits any employer from discriminating within any "establishment . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) differential based on any factor other than sex."20

Additional Laws Governing the Employment Relationship LO 24-6 Summarize the laws that protect employees' wages, benefits, health and safety standards, and rights. Several major categories of state and federal laws cover employee rights with regard to wages, benefits, and health and safety standards. Exhibit 24-3 lists significant state and federal legislation protecting employees. Exhibit 24-3Significant Laws Governing the Employment Relationship LAW IMPACT Wage and hour laws Federal and state laws that impose minimum-wage and hour requirements for employees. Family and Medical Leave Act (FMLA) Federal act requiring certain employers to establish a policy that provides all eligible employees with up to 12 weeks of unpaid leave during any 12-month period for several family-related occurrences (e.g., birth of a child, care of a sick spouse). Unemployment compensation State system, created by the Federal Unemployment Tax Act (FUTA), that provides unemployment compensation to qualified employees who lose their jobs. Consolidated Omnibus Budget Reconciliation Act (COBRA) Federal law that ensures that when employees lose their jobs or have their hours reduced to a level at which they would not be eligible to receive medical, dental, or optical benefits from their employer, the employees will be able to continue receiving benefits under the employer's policy for up to 18 months by paying the premiums for the policy. Employee Retirement Income Security Act (ERISA) Federal law that sets minimum standards for most voluntarily established pension and health plans in

private industry to provide protection for individuals in these plans. HIPAA and COBRA are amendments to ERISA. Occupational Safety and Health Act (OSHA) of 1970 Federal law that established the Occupational Safety and Health Administration, the agency responsible for setting safety standards under the act, as well as enforcing the act through inspections and levying fines against violators. Fair Labor Standards Act The Fair Labor Standards Act (FLSA) requires a minimum wage of a specified amount to be paid to all employees in covered industries. Congress raises the specified amount periodically to compensate for increases in the cost of living caused by inflation. The current federal minimum wage is $7.25. On May 18, 2016, the Department of Labor (DOL) published new FLSA regulations requiring that employers pay overtime (time and a half on anything over 40 hours worked in a workweek) to full-time salaried executive, administrative and professional employees making $47,476 annually ($913/week) or less. On August 31, 2017, a federal court invalidated the new rule. The court held that when the DOL set the $23,660 minimum salary level in 2004, it was consistent with Congress's intent because the level was set as a floor to screen out “obviously nonexempt employees, making an analysis of duties in such cases unnecessary.” Experts say the minimum salary level should be “somewhere around $33,000” to account for the rate of inflation since 2004.21 As of late 2018, no final decision had been announced. Page 590 Some states are now taking up the issue of minimum salaries for white collar workers. Currently, eight states have minimum compensation thresholds for overtime exemptions that are higher, or will eventually be higher, than the federal minimum of $23,660 per year: Alaska, California, Colorado, Connecticut, Iowa, Maine, New York, and Oregon.22 Family and Medical Leave Act When the Family and Medical Leave Act (FMLA) went into effect in 1993, it was hailed by its supporters as a breakthrough in American law and feared by its opponents as an unwieldy encumbrance on business. FMLA covers all public employers and private employers with 50 or more employees. It guarantees all eligible employees (those who have worked at least 25 hours a week for each of 12 months prior to the leave) up to 12 weeks of unpaid leave during any 12-month period for any of the following family-related occurrences: The birth of a child. The adoption of a child. The placement of a foster child in the employee’s care. The care of a seriously ill spouse, parent, or child. A serious health condition that renders the employee unable to perform any of the essential functions of his or her job. Page 591 Unemployment Compensation Although FMLA in some cases helps employees retain their jobs, what happens if they lose their jobs? The Federal Unemployment Tax Act (FUTA), passed in 1935, created a state system to

provide unemployment compensation to qualified employees who lose their jobs.23 Under this law, employers pay taxes to the states, which deposit the money into the federal government’s Unemployment Insurance Fund. Each state has an account from which it can access the money in the fund in accordance with the rules the state establishes for eligibility. States have different minimum standards for qualifying for unemployment compensation, although almost all states require that the applicant did not voluntarily quit or get fired for cause. Workers’ Compensation Laws Unlike many other laws affecting the employment relationship, workers’ compensation legislation is purely state law. Our coverage of this topic must therefore be rather generalized. Prudent businesspeople will familiarize themselves with the workers’ compensation statutes of the states within which their companies operate. Workers’ compensation laws ensure that covered workers who are injured on the job can receive financial compensation through an administrative procedure rather than having to sue their employer. For administrative convenience, most states exclude certain types of businesses and small firms from coverage. Some states also allow businesses that have sufficient resources to be self-insured rather than participate in the state program. Consolidated Omnibus Budget Reconciliation Act of 1985 The Consolidated Omnibus Budget Reconciliation Act (COBRA) ensures that employees who lose their jobs or have their hours reduced to a level at which they are no longer eligible to receive medical, dental, or optical benefits can pay to continue receiving benefits for themselves and their dependents under the employer’s policy. The employee must pay the premiums for the policy, plus up to a 2 percent administration fee, to maintain the coverage for up to 18 months, or 29 months for a disabled worker. This is often quite expensive. An employee has 60 days after coverage would ordinarily terminate to decide whether to maintain the coverage. This obligation does not arise under either of two conditions: The employee is fired for gross misconduct. The employer decides to eliminate benefits for all current employees. Employee Retirement Income Security Act of 1974 The Employee Retirement Income Security Act (ERISA) is “a federal law that sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans.”24 Under ERISA, employers must provide participants with all the following: Plan information (i.e., features and funding). Assurances of the fiduciary responsibility of those in charge of managing and controlling the plan assets. A grievance and appeals process for participants to get benefits from their plans. The right to sue for benefits and breaches of fiduciary duty.25 Employers are required to provide to employees, free of charge, a summary

plan description (SPD), which provides information on how the plan operates, the benefits under the plan, how to apply for such benefits, when such benefits vest, and when benefits may be paid out. Page 592 Occupational Safety and Health Act of 1970 The federal government regulates workplace safety primarily through the Occupational Safety and Health Act (OSHA) of 1970, which requires every employer to “furnish to each of his employees . . . employment . . . free from recognized hazards that are likely to cause death or serious physical harm.” The Occupational Safety and Health Administration (abbreviated OSHA, the same as the act) is the agency that is responsible for promulgating workplace safety standards, inspecting facilities to ensure compliance with the standards, and bringing enforcement actions against violators. In 2015, Ashley Furniture was fined almost $2.3 million for workplace safety violations. OSHA issued citations for 38 violations after more than 1,000 recordable work-related injuries in the previous 3.5 years at Ashley Furniture’s two Wisconsin locations. Citations included failure to implement procedures to prevent machines from unintentional start-up when operators changed blades and cleared jams and exposing workers to dangerous machine-operating parts.26 In addition, OSHA undertakes educational programs for employers and employees.

Employee Privacy in the Workplace LO 24-7 Identify components of employer privacy policies. With the rapid expansion of technology, new issues related to workplace privacy have evolved. Technology has stimulated the growth of such issues in a number of ways. On the one hand, technology has given employers new ways to gather information about employees. On the other hand, new technologies have provided more temptations for employees to be off the job at work, thus creating a stimulus for more employer monitoring. For example, surveys have shown that 90 percent of employees with Internet access at work look at non-work-related websites at least once a day,27 90 percent receive non-work-related emails,28 and 84 percent send non-work-related emails.29 Given such statistics, it is understandable that employers would want to monitor what employees are doing when they are supposed to be on the job. Electronic Monitoring and Communication Business owners need to understand the extent to which they can monitor employees’ telephone conversations, read their emails, and listen to their voice mail. Questions related to such monitoring primarily involve the common law tort of invasion of privacy and two federal statutes: the Omnibus Crime Control and Safe Streets Act of 1968,30 as amended by the Electronic Communications Privacy Act of 1986.31 Under the Omnibus Crime

Control and Safe Streets Act of 1968, employers cannot listen to the private telephone conversations of employees or disclose the contents of these conversations. They may, however, ban personal calls and monitor calls for compliance as long as they discontinue listening to any conversation once they determine it is personal. Violators may be subject to fines of up to $10,000. Under the Electronic Communications Privacy Act (ECPA) of 1986, employees' privacy rights were extended to electronic forms of communication, including email and cellular phones. ECPA outlaws the intentional interception of electronic communications and the intentional disclosure or use of the information obtained through such interception. In recognition of the fact that employers may sometimes need to monitor employee conversations for the purpose of improving employee performance or protecting employees from harassing calls, ECPA includes a business-extension exemption that allows employers to monitor employee telephone conversations in the ordinary course of their employment. This exception is subject to the constraint preventing the employer from continuing to listen to conversations after it becomes apparent that they are personal. Also, monitoring is allowed when employees give their prior consent. In Case 24-4, the court had to determine whether a woman's Facebook post was protected under the ECPA. Page 593 CASE 24-4 Ehling v. Monmouth-Ocean Hosp. Serv. Corp. 961 F. Supp. 2d 659 (Delaware 2013) FACTS: Plaintiff Deborah Ehling was hired by Monmouth-Ocean Hospital Service Corp. (MONOC) in 2004 as a registered nurse and paramedic. Plaintiff's claims in this case arise out of an incident involving her Facebook account. Ehling sued for violation of her privacy rights under the Federal Stored Communications Act (SCA) because another employee who had access to her social networking site copied items that were posted on the site and provided those copies to her supervisor. From 2008-2009, Plaintiff maintained a Facebook account and had approximately 300 Facebook friends. She selected privacy settings for her account that limited access to her Facebook wall to only her Facebook friends and did not add any MONOC managers as Facebook friends. However, Plaintiff added many of her MONOC coworkers as friends, including a paramedic named Tim Ronco. Plaintiff posted on Ronco's Facebook wall, and Ronco had access to Plaintiff's Facebook wall. Unbeknownst to Plaintiff, Ronco was taking screenshots of Plaintiff's Facebook wall and printing them or emailing them to MONOC manager Andrew Caruso. Ronco and Caruso became friends while working together at a previous job, but Ronco never worked in Caruso's division at MONOC. The evidence reflects that Ronco independently came up with the idea to provide Plaintiff's Facebook posts to Caruso. Caruso never asked Ronco for any information about Plaintiff, and

never requested that Ronco keep him apprised of Plaintiff's Facebook activity. In fact, Caruso was surprised that Ronco showed him Plaintiff's Facebook posts. Caruso never had the password to Ronco's Facebook account, Plaintiff's Facebook account, or any other employee's Facebook account. Once Caruso received copies of Plaintiff's Facebook posts, he passed them on to Quagliana, MONOC's Executive Director of Administration. On June 8, 2009, Plaintiff posted the following statement to her Facebook wall: An 88 yr old sociopath white supremacist opened fire in the Wash D.C. Holocaust Museum this morning and killed an innocent guard (leaving children). Other guards opened fire. The 88 yr old was shot. He survived. I blame the DC paramedics. I want to say 2 things to the DC medics. 1. WHAT WERE YOU THINKING? and 2. This was your opportunity to really make a difference! WTF!!!! And to the other guards. . . . go to target practice. After MONOC management was alerted to the post, Plaintiff was temporarily suspended with pay, and received a memo stating that MONOC management was concerned that Plaintiff's comment reflected a "deliberate disregard for patient safety." In response, Plaintiff filed a complaint with the National Labor Relations Board ("NLRB"). After reviewing the evidence, the NLRB found that MONOC did not violate the National Labor Relations Act. The NLRB also found that there was no privacy violation because the post was sent, unsolicited, to MONOC management. ISSUE: Whether the privacy protections of the Federal Stored Communications Act (SCA) applies to Facebook wall posts? REASONING: WILLIAM J. MARTINI, U.S. DISTRICT JUDGE: Plaintiff argues that Defendants violated the SCA by improperly accessing her Facebook wall post about the museum shooting and that her Facebook wall posts are covered by the SCA because she selected privacy settings limiting access to her Facebook page to her Facebook friends. The issue before the Court is whether the SCA applies to Facebook wall posts. Very few courts have addressed this issue. For the reasons set forth below, the Court finds that Facebook wall posts fall within the purview of the SCA. In 1986, Congress passed the Electronic Communications Privacy Act, which was intended to afford privacy protection to electronic communications. Title II of the Electronic Communications Privacy Act contains the SCA. The SCA covers: (1) electronic communications, (2) that were transmitted via an electronic communication service, (3) that are in electronic storage, and (4) that are not public. Facebook wall posts that are configured to be private meet all four criteria. The Court finds that, when users make their Facebook wall posts inaccessible to the general public, the wall posts are "configured to be private" for purposes of the SCA. Accordingly, the Court finds that non-public Facebook wall posts are covered by the SCA. Because Plaintiff in this case

chose privacy settings that limited access to her Facebook wall to only her Facebook friends, the Court finds that Plaintiff's Facebook wall posts are covered by the SCA. The Court next evaluates whether either of the SCA's statutory exceptions apply. The SCA "does not apply with respect to conduct authorized (1) by the person or entity providing a wire or electronic communications service; [or] (2) by a user of that service with respect to a communication of or intended for that user." First, access to Plaintiff's Facebook wall post was "authorized." The undisputed evidence establishes that Ronco voluntarily provided Plaintiff's Facebook posts to MONOC management without any coercion or pressure. Caruso testified at his deposition that Plaintiff's Facebook friend Ronco voluntarily took screenshots of Plaintiff's Facebook page and either emailed those screenshots to Caruso or printed them out for him. Plaintiff provided no evidence to support her theory that access to her Facebook page was unauthorized. Second, access to Plaintiff's Facebook wall post was authorized "by a user of that service." Plaintiff acknowledged that she added Ronco as a Facebook friend and posted on Ronco's Facebook wall. Third, Plaintiff's Facebook wall post was "intended for that user." Based on the privacy settings that Plaintiff selected for her Facebook page, Plaintiff's wall posts were visible to, and intended to be viewed by, Plaintiff's Facebook friends. On June 8, 2009, when Plaintiff posted the comment about the museum shooting, Ronco was one of Plaintiff's Facebook friends. Thus, the post was intended for Ronco. DECISION AND REMEDY: In conclusion, access to Plaintiff's Facebook wall post was authorized by a Facebook user with respect to a communication intended for that user. Therefore, the authorized user exception applies and defendants are not liable under the SCA. Motion for summary judgment GRANTED. SIGNIFICANCE OF THE CASE: A third party with legitimate access to your Facebook page falls under the "authorized user exception" to the SCA and could cost you your right to privacy. CRITICAL THINKING Do you agree with the court's reasoning? Would you have thought that actions by a third party could destroy your right to privacy? ETHICAL DECISION MAKING How do you feel about the third party employee who gave copies of the plaintiff's Facebook postings to management? Was his behavior ethical? Why or why not? Page 594 The key question in cases involving employer monitoring and interception of employee communications via email, telephone, or voice mail is whether the employee had a reasonable expectation of privacy with respect to the communication in question. Employers are in the strongest position if they have a clear policy establishing that there is no reasonable expectation of privacy. Employment law experts advise that having a clear employee privacy policy that employees sign will minimize the likelihood of

being sued by employees for invasion of privacy. These policies should be spelled out in the employee handbook and explained to employees. At a minimum, employer privacy policies should cover the following issues: Employer monitoring of telephone conversations. Employer surveillance policies. Employee access to medical and personnel records. Drug testing policies. Lie detector policies. Ownership of computers and all issues unique to the electronic workplace.

Use of Social Media in Employment Decisions LO 24-8 Recognize the circumstances under which social media may be used in employment decisions. The growth of social media has changed how the world communicates, and this includes the business world. Companies now use social media for recruiting, employee engagement, knowledge sharing, branding, and more. Business use of Facebook, Twitter, LinkedIn, YouTube, and numerous other social media sites has become commonplace. With that use, however, comes legal responsibilities. Page 595 Use of Social Media in Hiring Decisions May an employer use social media in hiring decisions? The answer is yes—if it's done carefully. Probably the biggest concern is discrimination. When accessing a potential employee's social media (e.g., Facebook), the employer may gain access to information in protected categories, such as age, race, ethnicity, religious affiliations, and disabilities. Such information must be ignored when making hiring decisions. Some experts suggest that employers delay social media searches until after they meet candidates. Another suggestion is to have someone other than the employment decision-maker do the social media screening, and then create a firewall between this person and the decision-maker. Employers should keep in mind, however, that background screening companies that use social media sites are subject to the provisions of the Fair Credit Reporting Act, under which the applicants must give permission for pre-employment investigations.32 A potentially little-known problem with using social media—particularly the most popular sites like Facebook and LinkedIn—is that the subscribers do not represent the U.S. or global job-applicant pools. Recent surveys show that social media sites have lower percentages of Latino and Black users than are in the general population. The burden, then, is on the employer to widen their search for new applicants to include job boards, newspapers, magazines, and job fairs.33 Some employers are waiting until the potential employee comes in for an interview and then asking the

candidate for their Facebook password. Many job applicants claim it is an invasion of privacy. But is it legal? The answer varies by state. Since 2012, some sort of protective legislation has been passed in 20 states. As of 2016, similar legislation is pending in 13 additional states.34 The amount of protection varies by state. Use of Social Media in Firing Decisions What happens if an employer wants to use information obtained from social media to fire an employee? The answer depends on the manner in which the employee is using social media. As an example, the National Labor Relations Act (NLRA) protects the rights of employees to act together to address conditions at work, with or without a union. This protection extends to certain work-related conversations conducted on social media, such as Facebook and Twitter.35 Employees are permitted to use social media to initiate group action and employers are prohibited from restraining those rights. However, personal grievances not aimed to induce group action would not be protected. Over the last several years, there have been a number of National Labor Relations Board (NLRB) lawsuits filed, with mixed outcomes. In response to employer requests for guidance, the NLRB's Acting General Counsel released three memos in 2011 and 2012 detailing the results of investigations in dozens of social media cases.36 Several discharges were found to be unlawful because they flowed from unlawful social media policies. In one case, however, a discharge was upheld despite an unlawful policy because the employee's posting was not work-related. The report underscored two main points regarding the NLRB and social media: Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees. An employee's comments on social media are generally not protected if they are mere gripes, not made in relation to group activity among employees. Page 596 In September 2012, the NLRB issued a decision that the firing of a BMW salesman for photos and comments posted to his Facebook page did not violate federal labor law. At issue was whether the salesman was fired exclusively for posting photos of an embarrassing accident at an adjacent Land Rover dealership, which did not involve fellow employees, or for posting mocking comments and photos with co-workers about serving hot dogs at a luxury BMW car event. Both sets of photos were posted to Facebook on the same day; a week later, the salesman was fired. The Board agreed with the Administrative Law Judge that the salesman was fired solely for the photos he posted of a Land Rover incident, which was not concerted activity and so was not protected.37 On December 14, 2012, the NLRB found it was unlawful for a non-profit organization to fire five employees who participated in Facebook postings about a co-worker who

intended to complain to management about their work performance.38 In its analysis, the Board majority applied settled Board law to social media and found that the Facebook conversation was concerted activity and was protected by the National Labor Relations Act. Employers may use social media in making employment decisions, but care must be taken to not run afoul of state and federal employment laws and regulations.

Responsibilities of Employers in Hiring Foreign Workers LO 24-9 Recall the agency and legislation that regulates the hiring of foreign workers. Until 1986, there was virtually no risk for employers who hired undocumented immigrants. But, beginning that year, Congress passed the Immigration Reform and Control Act. This act is an amendment to the Immigration and Nationality Act (INA) and requires employers to verify the identity and eligibility of all individuals hired in the United States after November 6, 1986.39 The INA designates Employment Eligibility Verification Form I-9 (Form I-9) as the means of documenting this verification.40 For assistance in filling out Form I-9, the United States Customs and Immigration Service (USCIS) publishes an Employer's Handbook on their website. This 69-page handbook also provides a thorough explanation of an employer's legal obligations. The federal agency responsible for immigration worksite enforcement is Immigration Customs and Enforcement (ICE).41 As of 2012, the agency developed a "comprehensive worksite enforcement strategy."42 If it is discovered that an employer knowingly employed undocumented immigrant workers, that employer will be in serious legal trouble. But what if the employer didn't know that the employee's papers were bad? Employers are required to confirm "work authorization," which means that every new employee, at the time of hire, must fill out Form I-9. The employer is not expected to be an expert on the documents that establish work authorization but must make a good faith effort to ensure that their employees are legally permitted to work in the United States. An employer should accept documents that "reasonably appear on their face to be genuine and to relate to the person presenting them."43 Additionally, employers are required to retain I-9 forms for a period of at least three years from the date of hire or one year after the employee is no longer employed, whichever is longer. Employers who fail to comply with the laws regarding the hiring of foreign workers risk criminal and civil sanctions. Civil penalties begin with a minimum of $375 per unauthorized worker for the first offense and range up

to $3,000 or more per unauthorized worker for employers who engage in a “pattern and practice” of hiring undocumented workers. These employers may also be imprisoned for up to six months.

Labor Laws and Unions LO 24-10 List the three major pieces of labor legislation. Many people would argue that the laws that improved workers’ conditions most significantly were not any of those previously discussed but, rather, were the laws that gave employees the right to organize and bargain collectively over wages and terms and conditions of employment. During the Great Depression, workers were first given the right to organize, and since that time, unionization rates have varied significantly. During the post-World War II period, more than one-third of American workers were organized. In 2016, the percentage of workers belonging to a union in the United States was 10.7 percent.44 CASE Nugget May an Employee Be Fired for Using Medical Marijuana? Roe v. Teletech Customer Care Management (COLO.) LLC Washington Court of Appeal 257 P.3d 586 (Wash. 2011) Jane Roe suffered from debilitating migraine headaches that caused chronic pain, nausea, blurred vision, and sensitivity to light. Roe took over-the-counter pain medication and prescription drugs for her headaches, but she claims conventional medications did not provide significant relief. In 2006, Roe received a prescription for lawful medical marijuana pursuant to Washington state’s Medical Use of Marijuana Act (MUMA). A few months later, TeleTech offered Roe a position as a customer service representative, incumbent upon her passing a drug test. Roe informed TeleTech of her use of medical marijuana and accepted the position. Two weeks after taking the drug test, Roe was fired because of the positive result from the drug test. Roe sued TeleTech, alleging wrongful termination in violation of the public policy. Roe argues MUMA proclaims a broad policy that the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision. TeleTech argued MUMA has a narrow purpose—namely, to provide users and physicians with an affirmative defense under state drug laws, not to broadly entitle users to employment protections. The trial court granted motion for summary judgment in favor of defendant TeleTech. The appellate court affirmed the decision, holding that MUMA does not prohibit an employer from discharging an employee for medical marijuana use, nor does it provide a civil remedy against the employer. It further held that MUMA also does not proclaim a sufficient public policy to give rise to a tort action for wrongful termination for authorized use of medical marijuana. Sources: Steven Musil, “Company Settles Facebook Firing Case,” CNet.com, February

7, 2011, http://news.cnet.com/8301-1023_3-20030955-93.html; see also Erline Aguiluz, “AMR Settles Dawnmarie Souza’s Wrongful Termination Lawsuit,” PhiladelphiaEmploymentLawNews.com, February 11, 2011, http://philadelphiaemploymentlawnews.com/2011/02/amr-settles-dawnmarie-souzas-wrongful-termination-lawsuit.html. Not all occupations are equally organized. The union membership rate for public-sector workers (34.4%) was substantially higher than the rate for private-sector workers (6.4%). Within the public sector, the union membership rate was highest for local government (40.3%), which includes employees in heavily unionized occupations such as teachers, police officers, and firefighters. In the private sector, industries with high unionization rates included utilities (21.56%), transportation and warehousing (18.4%), telecommunications (14.6%), and construction (13.9%).45 Page 598Page 599Page 600Page 601 Labor-management relations in the United States today are governed by three major pieces of legislation: Wagner Act of 1935 Taft-Hartley Act of 1947 Landrum-Griffin Act of 1959 The Taft-Hartley Act amended the Wagner Act, and they are jointly referred to as the National Labor Relations Act (NLRA). The Wagner Act of 1935 The first major piece of federal legislation adopted explicitly to encourage the formation of labor unions and provide for collective bargaining between employers and unions as a means of obtaining the peaceful settlement of labor disputes was the Wagner Act. Collective bargaining “consists of negotiations between an employer and a group of employees so as to determine the conditions of employment.”46 CASE Nugget May an Employee Be Fired for Trashing Her Employer on Facebook? Fair Labor Standards Board [on behalf of Dawnmarie Souza] v. American Medical Response of Connecticut Unpublished Case settled by unpublished agreement between parties, February 2011 Dawnmarie Souza was employed by American Medical Response (AMR) of Connecticut. A customer complained about her work, and she was required to prepare a response. Her supervisor refused to permit a representative of the Teamsters, the union representing the company’s workers, to help prepare her response. Souza then mocked her supervisor on Facebook, reportedly using several vulgarities to ridicule him. According to copies of Souza’s Facebook posts obtained by CNET, she called her supervisor a “dick” in one and “a scumbag” in another. The Connecticut ambulance company fired Souza on December 1, 2009. The National Labor Relations Board (NLRB) sued AMR of Connecticut on October 27, 2010, claiming the employee, Dawnmarie Souza, was illegally fired and denied union representation. The closely watched case touched on whether employers have the right to discipline employees for comments they make on social-networking sites. The NLRB complaint said that Souza “engaged in

concerted activities with other employees by criticizing respondent's supervisor . . . on her Facebook page" on November 8, 2009. In response to the NLRB complaint, AMR claimed Souza's comments were not protected activity. However, the NLRB contended that AMR's termination of Souza's employment violated the National Labor Relations Act, which allows employees to discuss the terms and conditions of their employment with co-workers and others. In February 2011, the case was settled. Under the terms of the settlement, AMR agreed to revise "overly broad rules" in the employee handbook regarding how employees can communicate on the Internet and with co-workers regarding their work conditions. According to the Fair Labor Standards Board (FLSB), the company also agreed not to discipline employees for requesting union representation. The allegations regarding Souza's discharge were resolved in a separate, private agreement between Souza and AMR. Financial terms were not revealed. Sources: Steven Musil, "Company Settles Facebook Firing Case," CNet.com, February 7, 2011, http://news.cnet.com/8301-1023_3-20030955-93.html; see also Erline Aguiluz, "AMR Settles Dawnmarie Souza's Wrongful Termination Lawsuit," PhiladelphiaEmploymentLawNews.com, February 11, 2011, http://philadelphiaemploymentlawnews.com/2011/02/amr-settles-dawnmarie-souzas-wrongful-termination-lawsuit.html Page 602 The Wagner Act also created an administrative agency, the National Labor Relations Board (NLRB), to interpret and enforce the NLRA. Finally, the act provides for judicial review in designated federal courts of appeal. The Taft-Hartley Act of 1947 The 12 years between passage of the Wagner Act and that of the Taft-Hartley Act saw a huge growth in unionization, which resulted in an increase in workers' power. Public perception of this trend led to the passage of the Taft-Hartley Act, also known as the Labor-Management Relations Act, which was designed to curtail some of the powers the unions had acquired under the Wagner Act. The Landrum-Griffin Act of 1959 The Landrum-Griffin Act primarily governs the internal operations of labor unions. This act, which was a response to evidence of certain undesirable internal labor union practices, requires certain financial disclosures by unions and establishes civil and criminal penalties for financial abuses by union officials. "Labor's Bill of Rights," contained in the act, protects employees from their own unions. The National Labor Relations Board The National Labor Relations Board (NLRB) is the administrative agency that interprets and enforces the National Labor Relations Act (NLRA). The NLRB's three primary functions are to Monitor the conduct of the employer and the union during an election to determine whether workers want to be represented by a union. Prevent and remedy unfair labor practices by employers or unions. Establish rules interpreting the

NLRA. The NLRB has jurisdiction over all employees except those who work in federal, state, and local government and those covered by the Railway Labor Act (employees in the transportation industry); independent contractors; agricultural workers; household domestics; persons employed by a spouse or parent; and supervisors, managerial employees, and confidential employees. In the preceding Case Nugget, the NLRB brought a lawsuit against a company after the company fired an employee for posting negative comments about a supervisor on Facebook. The Collective Bargaining Process Once the union has been certified, union and management must begin to bargain in good faith about wages, hours, and other terms and conditions of work. Note that the NLRB can order only the parties to bargain in good faith; it cannot order them to reach an agreement with respect to any contract term. The NLRA requires both the employer and the bargaining-unit representative to bargain collectively in good faith with respect to wages, hours, and other terms and conditions of employment. CASE OPENER WRAP-UP Brad Gets Fired from “So Clean!” At the beginning of this chapter, you were confronted with the situation between Brad and Jennifer. By now you should be able to answer all the questions presented to you. In some states, firing an employee for smoking (including off the job) is a state law issue. In Michigan, for example, such a firing would be legal. States are now passing laws preventing employers from firing those who smoke outside the workplace. Brad is an at-will employee, but that does not mean that he can be fired for an illegal (i.e., discriminatory) reason. Laws protecting employees against sex discrimination and sexual harassment are just as applicable to men as they are to women. Anyone who is treated in a discriminatory way “based on sex” may sue under the appropriate state or federal antidiscrimination laws. Most, though not all, states have their own state laws against discrimination and harassment. States may give more protection than federal laws but not less protection. There are still a few states that have no state laws against employment discrimination. Page 603 PRACTICAL TIPS for Business Managers Employers should have privacy-related policies or handbooks for employees that are reviewed for compliance with the NLRA and state law. Employee handbooks and policies should have a “disclaimer” that is sufficient to assure the employee’s status remains at-will. All policies and handbooks should be reviewed annually and updated by an employment law attorney.

SUMMARY When May an Employee Be Fired? At-will employment means that any employee who is not employed under a contract or a collective bargaining agreement may quit at any time for any reason or no reason at all, with no required notice to the employer. Moreover, the employer may fire the employee at any time, with no notice, for almost any reason. Federal Employment Discrimination Laws Governing Employers Federal law may be described as a minimum level of protection for all workers. State laws may give employees more, but not less, protection than federal laws. Some of the most important federal employment discrimination laws are the Civil Rights Act (CRA) of 1964—Title VII (as amended by the Civil Rights Act of 1991); Pregnancy Discrimination Act (PDA) of 1987; Age Discrimination in Employment Act (ADEA) of 1967; Americans with Disabilities Act; and Equal Pay Act of 1963. Civil Rights Act-Title VII Title VII of CRA (1964, as amended by the Civil Rights Act of 1991) protects employees against discrimination based on race, color, religion, national origin, and sex. It also prohibits harassment based on the same protected categories. Defenses to a charge of discrimination under Title VII include merit, seniority system, and bona fide occupational qualification (BFOQ). Disparate treatment: If the employee has been hired, fired, denied a promotion, and so on, based on membership in a protected class under Title VII, this is a form of intentional discrimination and qualifies the employee to sue for disparate-treatment discrimination. Disparate impact: Disparate-impact cases arise when a plaintiff attempts to establish that although an employer's policy or practice appears to apply to everyone equally, its actual effect is that it disproportionately limits employment opportunities for a protected class. Sexual harassment: Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that implicitly or explicitly makes submission a term or condition of employment; makes employment decisions related to the individual dependent on submission to or rejection of such conduct; or has the purpose or effect of creating an intimidating, hostile, or offensive work environment. Two recognized forms are hostile environment and quid pro quo harassment. Pregnancy Discrimination Act of 1978: PDA amended Title VII of CRA, expanding the definition of sex discrimination to include discrimination based on pregnancy. Equal Employment Opportunity Commission: The EEOC is the federal agency charged with overseeing Title VII of the Civil Rights Act. Administrative complaints must be filed with the EEOC (or an equivalent state agency) prior to filing a lawsuit for discrimination or harassment. Discrimination Based on Sexual Orientation—Actionable? In 2020, the U.S. Supreme Court held that Title VII's protections against discrimination based on "sex" included

employees fired for being homosexual or transgender. An employer who fires an individual for such traits by definition fires that person for traits or actions it would not have questioned in members of a different sex. This is exactly what Title VII forbids. Discrimination Based on Marriage In 2015 the U.S. Supreme Court held that marriage is a fundamental right for all and struck down state laws forbidding same-sex marriage. Age Discrimination in Employment Act of 1967 ADEA prohibits employers from refusing to hire, discharging, or discriminating in terms and conditions of employment on the basis of an employee or applicant being age 40 or older. Americans with Disabilities Act ADA prohibits discrimination against employees and job applicants with disabilities. May an Employer Discriminate against a Smoker? Some companies either won't hire smokers or are threatening to fire current employees who will not or are unable to quit smoking. Many states have passed laws preventing companies from engaging in such action. Equal Pay Act of 1963 EPA prohibits an employer from paying workers of one gender less than the wages paid to employees of the opposite gender for work that requires equal skill, effort, and responsibility. Additional Laws Governing the Employment Relationship Fair Labor Standards Act: Employers must follow federal minimum-wage and hour laws. FLSA covers all employers engaged in interstate commerce or the production of goods for interstate commerce and requires a minimum wage of a specified amount to be paid to all employees in covered industries. Congress periodically raises the specified amount to compensate for increases in the cost of living caused by inflation. The current minimum wage is $7.25. Family and Medical Leave Act: The FMLA covers all public employers, as well as private employers with 50 or more employees. It guarantees all eligible employees (those who have worked at least 25 hours a week for each of 12 months prior to the leave) up to 12 weeks of unpaid leave during any 12-month period for any of the following family-related occurrences: the birth of a child; the adoption of a child; the placement of a foster child in the employee's care; the care of a seriously ill spouse, parent, or child; or a serious health condition that renders the employee unable to perform any of the essential functions of his or her job. Unemployment compensation: The Federal Unemployment Tax Act (FUTA) created a state system that provides unemployment compensation to qualified employees who lose their jobs. Workers' compensation laws: State laws provide for financial compensation to employees or their dependents when a covered employee is injured on the job. Consolidated Omnibus Budget Reconciliation Act: COBRA ensures that when employees lose their jobs or have their hours reduced to a level at which they would not be eligible to receive medical, dental, or optical benefits from their employer,

the employees will be able to continue receiving benefits under the employer’s policy for up to 18 months by paying the premiums for the policy. Employee Retirement Income Security Act: ERISA sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans. Occupational Safety and Health Act of 1970: The Occupational Safety and Health Administration is responsible for setting safety standards under OSHA and enforcing the act through inspections and levying fines against violators. Employee Privacy in the Workplace Privacy issues are of increasing importance in the workplace. Privacy policies should cover matters such as employer surveillance policies, control of and access to medical and personnel records, drug testing, and email policies. Omnibus Crime Control and Safe Streets Act of 1968: Employers cannot listen to the private telephone conversations of employees or disclose the contents of these conversations. They may, however, ban personal calls and monitor calls for compliance as long as they discontinue listening to any conversation once they determine it is personal. Violators may be subject to fines of up to $10,000. Electronic Communications Privacy Act of 1986: Under ECPA, employees’ privacy rights were extended to electronic forms of communication, including email and cellular phones. ECPA outlaws the intentional interception of electronic communications and the intentional disclosure or use of the information obtained through such interception. Use of Social Media in Hiring Decisions May an employer use social media in hiring decisions? The answer is yes—if it’s done carefully. Probably the biggest concern is discrimination. A potentially little-known problem with using social media—particularly the most popular sites like Facebook and LinkedIn—is that the subscribers do not represent the U.S. or global job-applicant pools. Recent surveys show that social media sites have lower percentages of Latino and Black users than are in the general population. The burden, then, is on the employer to widen their search for new applicants to include job boards, newspapers, magazines, and job fairs. Hiring Foreign Workers In 1986, Congress passed the Immigration Reform and Control Act. This act is an amendment to the Immigration and Nationality Act (INA) and requires employers to verify the identity and eligibility of all individuals hired in the United States after November 6, 1986. If it is discovered that an employer knowingly employed undocumented immigrant workers, that employer will be in serious legal trouble. Employers who fail to comply with the laws regarding the hiring of foreign workers risk criminal and civil sanctions. Labor Laws and Unions Wagner Act of 1935: The Wagner Act was the first major piece of federal legislation adopted explicitly to encourage the formation of labor unions and provide for collective

bargaining between employers and unions as a means of obtaining the peaceful settlement of labor disputes. Collective bargaining: Collective bargaining consists of negotiations between an employer and a group of employees to determine the conditions of employment. National Labor Relations Board: The Wagner Act created the NLRB, an administrative agency, to interpret and enforce the National Labor Relations Act (NLRA) and to provide for judicial review in designated federal courts of appeal. Taft-Hartley Act of 1947: Also known as the Labor-Management Relations Act, the Taft-Hartley Act was designed to curtail some of the powers the unions had acquired under the Wagner Act. Just as the Wagner Act designated certain employer actions as unfair, the Taft-Hartley Act designated certain union actions as unfair. Landrum-Griffin Act of 1959: The Landrum-Griffin Act primarily governs the internal operations of labor unions. It requires certain financial disclosures by unions and establishes civil and criminal penalties for financial abuses by union officials. “Labor’s Bill of Rights,” contained in the act, protects employees from their own unions.

Point/Counterpoint Should Employer Be Permitted to Fire Employees “At Will?” YES NO Employees may quit at any time for any reason or no reason, therefore the same standard should apply to the employers’ ability to fire employees. Under at-will employment, employees still retain the right to sue their employers for violations under the law (e.g., discrimination, harassment, retaliation, violation of the Equal Pay Act, etc.) At-will employment allows employers to promote workers who show leadership and/or productivity with no issues regarding seniority (as would be the case under a collective-bargaining agreement). Employers should not be permitted to fire employees without good cause (e.g., unexcused absences, poor performance, etc.). It leaves the employee with no job security. At-will employment denies employees the right to a collective bargaining process to improve wages and to strike to protest poor working conditions. Because employers may hire and fire freely, they are likely to hire more people, thus creating more jobs to the benefit of employees. Because workers may be fired for virtually any legal reason, it causes less stability in the workforce.

Questions & Problems Name five statutes that prohibit discrimination in employment. Does Title VII apply to same-sex harassment? Explain your

response. What is the current amount of the federal minimum wage? When was the last time the federal minimum wage was increased? Page 606What is required for an employee to be eligible for benefits under the Family and Medical Leave Act? List the protected classes under the Civil Rights Act of 1964 (as amended in 1991). Pittsburgh Glass Works, LLC (“PGW”) manufactures automotive glass in Harmarville, Pennsylvania. In 2008, the automobile industry began to falter. PGW engaged in several reductions in force (RIFs) to offset deteriorating sales. The RIF of relevance to this case occurred on March 31, 2009, terminating the employment of approximately 100 salaried employees in over 40 locations or divisions. Individual unit directors had broad discretion in selecting whom to terminate. Seven plaintiffs worked in PGW’s Manufacturing Technology division. They were terminated as part of the March 2009 RIF by their supervisor, Gary Cannon. Each was over 50 years old at the time. Plaintiffs sued under the Age Discrimination in Employment Act (ADEA), alleging, among other things, disparate impact discrimination based on age. The District Court granted summary judgment for PGW on the basis that a disparate impact claim by plaintiffs 50 and older is not cognizable under the ADEA. The ruling was appealed. ADEA cases usually evaluate the effect of a facially neutral policy on all employees who are at least 40 years old. In this case, plaintiffs claim they have identified a policy that disproportionately impacted a subgroup of that population: employees older than 50. Do you believe that the appellate court should recognize the claim of disparate impact against the subgroup? How do you think the appellate court ruled and why? Source: Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61 (2017). In October 2005, Blatt was diagnosed with “Gender Dysphoria, also known as Gender Identity Disorder,” which she argues substantially limits one or more of her major life activities, including, but not limited to, interacting with others, reproducing, and social and occupational functioning. Blatt alleges that shortly after she was hired by Cabela’s in September 2006, Cabela’s began to discriminate against her on the basis of her sex and her disability, in violation of Title VII of the Civil Rights Act and the ADA, and that Cabela’s retaliated against her for opposing this discrimination, also in violation of these statutes. Blatt further alleges that in February 2007, Cabela’s terminated her employment based on her sex and disability. The stated purpose of the ADA is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” Congress opted to define the scope of the statute’s coverage by means of a flexible and broad definition of “disability,” namely, “a physical or mental impairment that substantially limits one or more major life activities of [an] individual.” Standing in

contrast to this broad definition of disability, there are a few exceptions to the ADA's coverage. The provision at issue in this case excludes from ADA coverage approximately one dozen conditions, including gender identity disorders. Cabela's contends that the statute's reference to gender identity disorders applies to Blatt's condition and that the provision therefore excludes her condition from the ADA's scope and that the court should grant defendant's motion to dismiss the claims. Should the court grant the defendant's motion to dismiss? Should gender identity disorder be considered a disability under the ADA? Source: Blatt v. Cabela's Retail, Inc., 2017 U.S. District LEXIS 75665 (Eastern District PA 2017) The Pregnancy Discrimination Act added new language to the definitions subsection of Title VII of the Civil Rights Act of 1964. The first clause of the Pregnancy Discrimination Act specifies that Title VII's prohibition against sex discrimination applies to discrimination "because of or on the basis of pregnancy, childbirth, or [1341] related medical conditions." The act's second clause says that employers must treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." Petitioner Young was a part-time driver for respondent United Parcel Service (UPS). When she became pregnant, her doctor advised her that she should not lift more than 20 pounds. UPS, however, required drivers like Young to be able to lift up to 70 pounds. UPS told Young that she could not work while under a lifting restriction. Young subsequently filed this federal lawsuit, claiming that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. She brought only a disparate-treatment claim of discrimination. Young pointed to UPS policies that accommodated workers who were injured on the job, had disabilities covered by the Americans with Disabilities Act of 1990 (ADA), or had lost Department of Transportation (DOT) certifications. Pursuant to these policies, Young contended, UPS had accommodated several individuals whose disabilities created work restrictions similar to hers. She argued that these policies showed that UPS discriminated against its pregnant employees because it had a light-duty-for-injury policy for numerous "other persons," but not for pregnant workers. UPS responded that, since Young did not fall within the on-the-job injury, ADA, or DOT categories, it had not discriminated against Young on the basis of pregnancy, but had treated her just as it treated all "other" relevant "persons." UPS brought a motion for summary judgment, which the trial court granted against Young. The decision was affirmed on appeal by the Fourth Circuit. The case was then appealed to the U.S. Supreme Court. How should the court decide? Should Young be given the

opportunity to argue before a trial court that treating pregnancy differently from other disabilities is disparate treatment discrimination? Why or why not? Source: Young v. UPS, 135 S. Ct. 1338 (2015). Page 607Exxon maintained a corporate policy that prohibited its pilots from flying corporate aircraft after they reached the age of 60 and forced such pilots to retire involuntarily at age 60. This rule mirrored a rule the Federal Aviation Administration applied to pilots flying for commercial airlines. Based on the age 60 rule, Exxon forced at least three pilots to retire in 2006 and 2007. The EEOC brought suit on behalf of these pilots and others alleging age discrimination. Exxon argued that the requirement for pilots to be under age 60 is a bona fide occupational qualification. Do you agree? Why or why not? Source: EEOC v. Exxon Mobil Corp., 2012 U.S. Dist. LEXIS 183101. The plaintiff, Aileen Rizo, is an employee of the public schools in Fresno County. After discovering that the County paid her less than her male counterparts for the same work, she brought this action under the Equal Pay Act, and the California Fair Employment and Housing Act. When the County moved for summary judgment, it conceded that it paid the plaintiff less than comparable male employees for the same work. However, it argued that this result was lawful because the pay differential was “based on any other factor other than sex,” an affirmative defense to a claim under the Equal Pay Act. This other factor was prior salary. The court granted motion for summary judgment for the County. Plaintiff appeals from that decision. Is “prior salary” alone a sufficient defense to violation of the Equal Pay Act? Why or why not? Source: Rizo v. Yovino, 854 F.3d 1161 (2017) Lisa Harrison (Harrison) was hired by Defendant at Family House of Louisiana (Family House), a long-term residential treatment facility for chemically dependent women and their children, on November 23, 1999. She was hired as a Prevention/Intervention Specialist, and her job included overseeing a day care program for the children of mothers staying at Family House. At the time she was hired, Harrison weighed more than 400 pounds. On September 6, 2007, Harrison was terminated from her position at Family House. At the time of her termination, she weighed 527 pounds. On October 17, 2007, Harrison filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that she had been terminated because Defendant regarded her as disabled due to her obesity. Is obesity a disability under the Americans with Disabilities Act? Source: EEOC v. Res. for Human Dev., Inc., 25 Am. Disabilities Cas. (BNA) 964 (2012). Cynthia Anderson worked for the city of Columbus, Georgia, answering telephone calls from citizens. Anderson knew that calls from citizens were recorded, but she was unaware that, due to a glitch, the telephone system continued to record her

statements through her headset after a call was terminated. Anderson made disparaging remarks about the city manager’s office, and her employment was terminated. Anderson sued the city, alleging that it had no right to record her private conversations with co-workers, which were unrelated to city business. Who should prevail? Why? Source: Anderson v. City of Columbus, Georgia, 2005 U.S. Dist. LEXIS 12612. Meadows worked as an assistant manager at a Dollar General store. While she was ringing up an order for a customer, he became verbally abusive. After she finished ringing up the sale, the customer threw the bag, containing a can of motor oil, at Meadows, hitting her in the eye. Meadows suffered a detached retina. The trial court awarded Meadows permanent partial disability under workers’ compensation for her injury. Dollar General appealed the decision, arguing that the injury did not occur in the course of employment. Do you believe that Meadows’ injury occurred during the course of her employment? Why or why not? Was the trial court correct in granting her permanent partial disability, or did the appeals court overturn that decision? Source: Dollar General Corp. v. Meadows, 63 P.3d 548 (2002 WL 31991909, Okla. Ct. Civ. App. 2002). Several employees of Wal-Mart Stores Inc. (Wal-Mart) were involved in physical confrontations with shoplifting customers. Wal-Mart’s policy requires employees to disengage and withdraw from potentially violent situations. The first incident involved plaintiffs Derek Holt and Eric Hunter, who were employed at Wal-Mart’s West Valley City, Utah, store. Holt and Hunter confronted a shoplifter. When the shoplifter tried to run away, they grabbed her arms. During the ensuing struggle, the shoplifter pulled out a small pocketknife and shouted that she was going to stab Holt and Hunter if they did not let go. Holt and Hunter maintained their hold, however, and a customer helped pry the knife out of the shoplifter’s hand. Wal-Mart terminated Holt’s and Hunter‘s employment for violating the policy. Page 608The second incident involved plaintiffs Shawn Ray, Lori Poulsen, and Gabriel Stewart, who were employed at Wal-Mart’s Layton, Utah, store. Several employees at that store, including Ray and Poulsen, approached a customer who was attempting to steal a laptop by concealing it in his pants and escorted him to the store’s asset protection office, where they were joined by Stewart. There is some discrepancy regarding what happened next. According to Wal-Mart, the customer placed the laptop on a desk and stated, “You have your laptop, I am now going to leave, and I have something I am not supposed to have.” Poulsen saw the customer move a gun from his back to his coat pocket. A physical struggle ensued, resulting in the Wal-Mart employees pinning the customer against a wall and grabbing the gun. The employees’ account of the incident differs somewhat. According to them,

after the customer removed the laptop from his pants he said, “I have something I shouldn’t have. Don’t make me do this!” Poulsen noticed the customer had a gun and yelled “Gun! Hand!” The customer rushed towards the door but then turned and shoved Stewart against the wall and pressed the gun to his back. A skirmish resulted, and the Wal-Mart employees managed to remove the gun from the customer’s hands and force him to the ground. Ultimately, Ray, Poulsen, and Stewart were all fired following the incident for violating the policy. The employees sued Wal-Mart in federal district court for wrongful termination, arguing that terminating a person’s employment for exercising self-defense in the workplace violates Utah public policy. Is the right of self-defense a public policy exception to “at will” employment? In other words, were the employees within their rights to defend themselves? Or should Wal-Mart be permitted to terminate the employees for violation of the policy? Source: Ray v. Wal-Mart Stores, Inc., 2015 UT 83 (2015). Anthony Romeo was an openly gay student at Seton Hall, a Catholic university. He claimed that he elected to attend Seton Hall in part because of its published anti-discrimination policy. In 2003, he applied to the Seton Hall University Department of Student Affairs for provisional recognition of a gay and lesbian student organization. Dr. Laura Wankel, vice president of student affairs at Seton Hall, responded to Romeo’s application in a letter, stating in pertinent part: “I am informing you that your application for provisional recognition has been denied. No organization based solely upon sexual orientation may receive formal University recognition.” Wankel went on to say that “the Division of Student Affairs remains prepared to work with gay and lesbian students to meet their needs. I am committed to working collaboratively with you and other students in fostering a positive, safe and caring community.” Wankel then made a modest proposal giving the group some rights. The proposal, however, was not satisfactory to the students, and Romeo filed his complaint alleging violations of New Jersey’s law against discrimination. He also cited Seton Hall’s nondiscrimination policy: “No person may be denied employment or related benefits or admission to the University or to any of its programs or activities, either academic or nonacademic, curricular or extracurricular, because of race, color, religion, age, national origin, gender, sexual orientation, handicap and disability, or veteran’s status.” How should the court rule? May a Catholic university prevent recognition of a gay and lesbian student organization? Does the university’s nondiscrimination policy make a difference? Why or why not? Source: Romeo v. Seton Hall University, 2005 N.J. Super. LEXIS 197.

Part 8 Government Regulation CHAPTER 25 Consumer Law Page 609 CASE OPENER Deceptive Advertising and the Ultimate Weight Loss Cure Defendant Trudeau acted in several infomercials promoting his product, the Weight Loss Cure book. Trudeau's weight loss plan consisted of four phases. These phases included instructions such as calorie intake, food restrictions, regular colonics, and avoiding skin creams. Above all else, the defendant's weight loss plan instructed dieters always to take daily doses of coral calcium. The defendant also claimed that his weight loss method had been suppressed from the mainstream by food and restaurant companies and government agencies. The Federal Trade Commission (FTC) sought to hold Trudeau in contempt for violating a 2004 Consent Order command that he must not misrepresent the content of his book in his infomercials. The court ruled in favor of the FTC, finding that nowhere in Trudeau's infomercials did he mention colonics, organ cleanses, eating only organic food, and calorie restrictions. The court found that Trudeau's statements on the infomercials misled consumers and violated the Consent Order. What did the court look for to determine whether Trudeau misled consumers? How was Trudeau sanctioned by the court? LEARNING OBJECTIVES LO 25-1 Recall the function of the Federal Trade Commission. LO 25-2 Explain how the Federal Trade Commission determines what constitutes deceptive advertising. LO 25-3 Recall the purpose of the federal laws that regulate product labeling and packaging. LO 25-4 Describe the different acts that provide credit protection. LO 25-5 Describe the different laws that help ensure consumer health and safety. Page 610 Consumers buy products and services from sellers every day. In some instances, however, consumers do not have as much power in the transaction as the seller has. As we see in the Trudeau case, the book author had much more knowledge about the product he was selling than did the consumers. Because Congress recognized the opportunities for sellers to take advantage of buyers in this way, it created laws that regulate transactions between consumers and sellers. A consumer law is a statute or administrative rule serving to protect consumer interests. Various state and federal consumer laws protect consumers from unfair trade practices of sellers as well as from unsafe products. Although the laws differ among the states, many of the state laws provide consumer protection exceeding that guaranteed by federal law. This chapter explores a range of consumer laws concerning deceptive advertising, product labeling, sales procedures, health and product safety, and consumer credit. First, however, it discusses a

federal agency that is one of the most important creators and enforcers of consumer protection laws—the Federal Trade Commission.

The Federal Trade Commission LO 25-1 Recall the function of the Federal Trade Commission. Congress created the Federal Trade Commission (FTC) through the Federal Trade Commission Act of 1914.1 The FTC is an independent federal agency with five commissioners appointed by the president and confirmed by the Senate. Each commissioner serves a seven-year term. The president chooses one commissioner to serve as chair of the FTC. How does the FTC meet its goal of protecting consumers? It does so through two methods: (1) consumer education and (2) legal action. First, the FTC creates campaigns to educate consumers about laws that protect them. Second, the FTC educates businesses to help them comply voluntarily with consumer laws. For example, the FTC creates industry guides, interpretations of consumer laws, to encourage businesses to stop unlawful behavior. When businesses follow the FTC guidelines, they can cut potentially steep costs associated with violating consumer laws. How the FTC Brings an Action The FTC receives a variety of complaints about businesses from consumer groups and individuals. When a consumer files a complaint with the FTC, they trigger a chain of events that could lead to an FTC action against the violator. The FTC typically begins a nonpublic investigation of the company. If, after its investigation, the FTC believes that a company violated the law, the FTC sends a complaint to the alleged violator. At that time, the FTC may settle the complaint through a consent order with the company. A consent order is a statement in which the company agrees to stop the disputed behavior but does not admit that it broke the law. If the company violates the consent order, it will usually be forced to pay a fine. If the company refuses to enter into a consent agreement, the FTC may then decide to issue a formal administrative complaint. Issuance of this complaint leads to a hearing before an administrative law judge. If the judge decides that the company has violated the law, the FTC issues a cease-and-desist order, requiring the company to stop the illegal behavior. However, the company may appeal this decision to the five commissioners. If the commissioners uphold the ruling, the company may appeal to the U.S. court of appeals and, finally, to the Supreme Court. If the courts uphold the FTC’s decision, the company must follow the cease-and-desist order. If the company violates the order, the FTC can seek an injunction against the company or fine the company up to $10,000 per violation. Page 611 BUT WHAT IF? . . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? Let’s say in the Case Opener that the

FTC investigated Trudeau and decided that he was misrepresenting his products and possibly harming people. They sent him a complaint letter. What are different options the two parties can take to resolve the issue? Trade Regulation Rules Bringing an action may be effective in protecting consumers from the activities of one company, but how can the FTC protect consumers if most companies within one industry are using the same unfair or deceptive practices? Bringing actions against all of these companies would be costly and time-consuming. An alternative method of addressing these practices is through trade regulation rules. If the FTC finds that deception is pervasive in an industry, it can recommend an administrative rule that has the effect of law. For example, while the marketing industry may be a substantial and mostly legitimate field, it is an industry where the power of deception can be easily abused. Thus, the ways in which a company can market its products is heavily regulated by the FTC. For example, a growing trend within the marketing industry has been to pass off paid advertisements as regular news stories or social media posts. The FTC is concerned that people will believe these posts to be legitimate news stories or recommendations, and thus has set rules requiring that paid posts clearly distinguish themselves as such. In April 2017, the FTC sent out over 90 letters to celebrities, athletes, and other influencers on Instagram reminding them to clearly disclose their relationships to brands when endorsing products through social media. However, the FTC's power does not simply stop at recommendation letters; the FTC can bring legal action against those who violate FTC rules.

Deceptive Advertising LO 25-2 Explain how the Federal Trade Commission determines what constitutes deceptive advertising. Section 5 of the Federal Trade Commission Act prohibits deceptive and unfair acts in commercial settings, including consumer purchases. This section of the chapter specifically analyzes deceptive advertising, the practice of advertising with claims that mislead or could mislead a reasonable consumer. Puffing, the use of generalities and clear exaggerations, is permissible. Puffing tends to take the form of opinions and unverifiable claims about a product. For example, a pizza restaurant may claim that it has "the best pizza in the world." It is impossible to prove that the pizza is really the best, but it is also impossible to prove that it is not. Either way, the claim is so beyond belief that a reasonable consumer would not accept it as true. On the other hand, deceptive advertising tends to involve false claims regarding verifiable facts. For example, if a car manufacturer claims that a car gets 40 miles to the

gallon when it really only gets 30 miles to the gallon, the manufacturer would be engaging in deceptive advertising. A car’s gas mileage is a testable and verifiable fact that is not simply a matter of opinion. The FTC decides whether an advertisement is deceptive on a case-by-case basis. Deceptive claims have three elements: (1) a material misrepresentation, omission, or practice that is (2) likely to mislead (3) a reasonable consumer.2 When an advertised claim appears to be authentic but in fact is not, the advertising is deceptive. Although the FTC has the power to determine whether an advertisement is deceptive or just mere puffing, courts often have to make that determination as well. Sometimes companies seek injunctive relief for false advertising of their competitors under the Lanham Act. The Lanham Act was intended, in part, to protect persons engaged in commerce against false advertising and unfair competition. Page 612 If the advertisement is a half-truth—that is, the information presented is true but incomplete—the advertiser is deceiving the consumer. To combat deceptive advertisements and half-truths, the FTC requires ad substantiation, requiring advertisers to have a reasonable basis for the claims made in their advertisements. As Exhibit 25-1 points out, many have argued that “Made in the USA” labels are deceptive advertising. Exhibit 25-1“Made in the USA” Labels and the FTC Many companies boast that their products are “Made in the USA.” But what exactly does it mean to be made in the USA? The FTC is charged with setting forth standards to avoid deception and false advertising about products that are supposedly made in the United States. In the past, the FTC stated that “Made in the USA” should not be used “unless all, or virtually all, of the components and labor are of U.S. origin.” Thus, if a company assembled a product in the United States but shipped in some components from out of the country, the FTC would argue that “Made in the USA” should not be used. The FTC’s definition of the phrase was stricter than others’ definitions. For example, NAFTA defines “Made in the USA” as a product for which at least 55 percent of the labor and components are from Canada, Mexico, or the United States. Customs draws the line at 50 percent. In 1997, the FTC decided to continue enforcing the “all or virtually all” standard. Those with strong union ties had argued against any weaker definition, such as the 75 percent the FTC had been debating. Source: Federal Trade Commission, FTC Consumer Report, “Complying with the Made in the USA Standard,” www.ftc.gov/bcp/conline/pubs/buspubs/madeusa.shtm An illustration of an FTC claim of deceptive advertising involved Bayer HealthCare Pharmaceuticals in 2007. The FDA required Bayer to run corrective commercials that adjust assertions made in Bayer’s original Yaz commercials. Federal laws state that drug advertising can promote only federally approved

uses of a drug. Although the agency approved Yaz as a drug for birth control with a side value of treating premenstrual dysphoric disorder, the Yaz commercials implied that Yaz was a drug for acne and general mood problems. Bayer agreed in 2009 to run a $20 million marketing campaign for the next six years that was to be federally screened before being submitted for public viewing. The advertising of Yaz is a major concern because it is the leading oral contraceptive in the country. Sales of Yaz in 2008 totaled approximately $616 million. GLOBAL Context Digital Archive Japan/Alamy Stock Photo Deceptive Advertising in China Although puffery is allowed in advertising in the United States, not all countries universally accept puffery as an acceptable form of advertising. For example, China has greater restrictions on advertising than the United States. Problematic advertising claims in China fall largely into two groups: (1) unsubstantiated, clearly deceptive claims that are also unacceptable in the United States, and (2) claims such as puffery, comparisons, and statistics, which are okay in the United States but are prohibited or restricted by Chinese law. Specifically, in China there is a statutory ban on puffery due to its deceptive nature. The ban has the potential to affect commerce and trade of global brands that have a standardized approach in their international advertising and do not take into careful consideration the Chinese regulations. In such cases, Chinese regulators of advertisements rarely accept the puffery defense. However, the supreme court of China does exonerate commercial claims that employ obvious exaggerations but are unlikely to mislead the public, slightly contradicting the statutory ban on puffery (China Supreme People's Court, 2007). Because the terms misleading and deceptive are subjective, sometimes judges in China determine on a case-by-case basis what constitutes obvious exaggerations that are unlikely to mislead, just as U.S. judges often face this question. To help judges determine whether illegal puffing has occurred, the China Supreme People's Court advises the lower courts to consider factors such as daily life experience, the general understanding of the relevant public, people being misled, and the situation of the target consumer. Source: Zhihong Gao, "Controlling Deceptive Advertising in China: An Overview," Journal of Public Policy & Marketing, Fall 2008, pp. 165–177. Page 613 The existence of deceptive advertisements is not enough alone to prove damages for recovery when individual civil suits are filed. For example, in Oliveira v. Amoco Oil Co., a class action suit was brought against Amoco for deceptive advertisements.3 Amoco had made many claims over a seven-year period about the superiority of its premium gasoline. However, according to the plaintiffs, no scientific evidence supported Amoco's claims. The plaintiffs argued that the advertisements

created a higher demand for Amoco gas, creating artificially high gas prices that hurt consumers regardless of specific reliance on the advertisements. The court rejected this argument, ruling that a market theory of causation is not enough to establish damages in an individual case. Moreover, reliance on the advertisements is a crucial element in establishing liability. The following case illustrates the analysis courts use when an alleged instance of deceptive advertising comes before them. CASE 25-1 EHLERS v. BEN & JERRY'S HOMEMADE INC. No. 2:19-cv-00194 (D. Vt. 2020) FACTS: Ben & Jerry's was founded in 1978 in Burlington, Vermont, by Ben Cohen and Jerry Greenfield. Ben & Jerry's was sued by James Ehlers in a class action suit alleging false advertising. Ehlers asserted that Ben & Jerry's rose to prominence in the 1980s and 1990s as a socially conscious, Vermont-based company which attracted consumers due to "the brand and all that it represented[.]" Ehlers alleged that in the "past several years," Unilever, Ben & Jerry's parent company, has breached consumers' trust by representing on Ben & Jerry's ice cream packaging and website that Ben & Jerry's products are "sourced exclusively from 'happy cows' on Vermont dairies that participate in a special, humane 'Caring Dairy' program." Ehlers asserted that until just prior to the suit, Ben & Jerry's website claimed that the "Caring Dairy" program is "required for all farmers." In reality, however, Ehlers asserted that only a percentage of the milk used in Ben & Jerry's products is sourced from the Caring Dairy program, while the remainder comes from mass-production dairy operations, purportedly "exactly what consumers who choose Ben & Jerry's Products would like to avoid." Ben & Jerry's ice cream packaging, signage in its retail locations, and take-away cups "present the Products as made with milk produced by 'happy cows'" and feature cartoon images of happy cows in green fields under blue skies in order to depict happy animals. ISSUE: Did Ben & Jerry's engage in deceptive advertising by not sourcing its milk from "happy cows?" REASONING: Plaintiff does not contest that "happy cows" constitutes a nonactionable opinion and asserts that his true claim focuses on the websites representation that "'Caring Dairy' standards are required of all farmers whose happy cows supply milk and cream for Ben & Jerry's Products." A statement is misleading under the VCPA if it is "likely to mislead a reasonable consumer." Plaintiff identifies the following heading on Ben & Jerry's website as the basis for his VCPA claim: "Basic standards for being a Caring Dairy farmer (required for all farmers)[.]" Read in a vacuum, a reasonable consumer might interpret this phrase to mean that Caring Dairy farmer standards apply to all farmers who supply Ben & Jerry's. It may also, however, be interpreted as applying to all farmers who seek to have their farms designated as a "Caring Dairy." The court need

not resolve this conflict because the website as a whole makes it clear that the section, titled “Caring Dairy Standards[,]” sets forth the basic standards “to be considered a Caring Dairy farm” as well as the detailed eligibility requirements for “Silver” and “Gold” tier status. By focusing on an alleged representation that Ben & Jerry’s products are “sourced exclusively from ‘happy cows’ on Vermont dairies that participate in a special, humane ‘Caring Dairy’ program[,]” Plaintiff bases his claim on a representation that is neither contained on Ben & Jerry’s ice cream cartons nor on its website. In the absence of this actual statement, the court considers whether it is a reasonable interpretation of the statements that do appear on Ben & Jerry’s products and website. The ice cream carton label which Plaintiff asserts leads consumers to the alleged misrepresentation states that “We strive to make the best possible ice cream in the best possible way. We source Non-GMO ingredients, Fairtrade cocoa & sugar, eggs from cage-free hens & milk & cream from happy cows. Learn more at benjerry.com.” Plaintiff identifies no portion of the foregoing statement that is false. The benjerry.com website, in turn, describes the Caring Dairy program as one that “participating farms” join “voluntarily[.]” It is unreasonable for a consumer to interpret a single phrase in a single heading without reference to the contents of the section that immediately follow the heading. Context is crucial especially where, as here, Plaintiff cannot point to an actual misrepresentation, but instead relies exclusively on his interpretation of a phrase he characterizes as conveying the impression that all of Ben & Jerry’s products are “sourced exclusively” from “Caring Dairies.” It is Plaintiff’s burden to plausibly allege that the Ben & Jerry’s ice cream carton or website contains a statement that “conveys more than one meaning to reasonable consumers and one of those meanings is false[.]” Because neither Ben & Jerry’s products nor its website represents that its ingredients are sourced exclusively from Caring Dairy farms, Plaintiff’s entire claim is grounded on a single phrase in a single heading on a multipage website which is neither false nor misleading when considered as a whole. DECISION AND REMEDY: Defendant’s motion to dismiss GRANTED. SIGNIFICANCE OF THE CASE: This case is an example of how a court examines a deceptive advertising case and the importance of context when interpreting allegedly false claims. CRITICAL THINKING What are the primary facts of this case? Is there any missing information you would call for to enable you to evaluate the court’s reasoning better? What evidence does the court use to support its decision? Are you persuaded by this evidence? ETHICAL DECISION MAKING Do you think the company’s advertising in this case was ethical, given the facts of the case? Review the WH process of ethical decision making in Chapter 2. What value did the court highlight in its

decision? Page 614 Future business managers need to understand what kinds of advertising claims are permissible in our legal environment. To simplify this understanding for consumers and business owners, the FTC has classified certain types of deceptive or unfair advertising practices and created specific rules defining and prohibiting violations of these rules. The next section examines these classifications. Bait-and-Switch Advertising When sellers advertise a low price for an item generally unavailable to the consumer and then push the consumer to buy a more expensive item, they are engaging in bait-and-switch advertising. The low advertised price baits the consumer. Then the salesperson switches the consumer to a higher-priced item. In 1968, the FTC prohibited bait-and-switch advertising. According to the FTC's "Guides against Bait Advertising," a seller can engage in bait-and-switch advertising in several ways. For instance, the seller might advertise a low price but have too little of the advertised good in stock, or the seller might discourage employees from selling the advertised item. These bait-and-switch advertising techniques violate FTC rules. CASE Nugget Are "No-Annual-Fee" Offers Bait-and-Switch Advertising? Paula E. Rossman, Individually and for All Others Similarly Situated v. Fleet Bank (R.I.) National Association et al. U.S. Court of Appeals for the Third Circuit 280 F.3d 384 (2002) In 1999, Paula Rossman received a credit card offer from Fleet Bank, advertising the Fleet Platinum MasterCard with a low annual percentage rate and no annual fee. A few months after Rossman's account was opened, Fleet imposed an annual fee. Fleet sent a letter to Rossman stating that a $35 annual fee would be charged to her account annually on the anniversary of her account's opening; however, a second letter notified Rossman that the annual fee would be charged to her account within months. Rossman sued Fleet, claiming that Fleet had violated the disclosure requirements of the Truth in Lending Act (TILA) and engaged in a bait-and-switch advertising scheme. The district court dismissed Rossman's TILA claim for failing to state a claim on which relief could be granted. Rossman appealed to the Third Circuit Court of Appeals. The appeals court applied a two-part test to determine whether Fleet's statement that the card had no annual fee was lawful. "First, it must have disclosed all of the information required by the statute. And second, it must have been true—that is, an accurate representation of the legal obligations of the parties at that time—when the relevant solicitation was mailed." Rossman claimed that Fleet was required to disclose all fees that were currently imposed as well as any fees that may be imposed later. Rossman also claimed that Fleet's disclosure was misleading by suggesting that there would never be an annual fee. Rossman further claimed that Fleet engaged in a bait-and-switch scheme, using the

no-annual-fee provision to lure consumers into a contract when Fleet had no intention of honoring that provision. Fleet argued that it was not required to disclose any future fees that may be imposed, but only those that currently existed. Fleet also turned to a clause in the solicitation disclosure insert that stated it “reserve[d] the right to change the benefit features associated with your Card at any time.” The court found that Fleet’s disclosure, as placed and worded, did not adequately link itself to the no-annual-fee provision. Thus, if the annual fee was permitted to be changed within the first annual term of the agreement, the court found that the statement “no annual fee” was an inadequate disclosure. Turning its attention to Rossman’s claim that Fleet had engaged in a bait-and-switch advertising scheme, the court did not see Fleet’s behavior as resembling the classic bait-and-switch design. Ordinarily, consumers are baited with certain terms, but the switch for less enticing products or terms is made before the consumer enters into an agreement or contract. Rather, the court found Fleet’s behavior to be even more egregious because Fleet actually bound the consumer in a contract before making the switch to charging an annual fee. Thus, Fleet had violated the provisions of TILA. The appeals court reversed the district court’s ruling and remanded for proceedings. E-Commerce and the Law Deceptive Ads Could Lead to Computer Consequences Deceptive advertising in the physical world usually causes consumers to waste money on a worthless product or one that does not function as advertised. On the Internet, deceptive advertising can be much more dangerous to the individual. A very popular form of this deceptive advertising is known as bait and click advertising. Bait and click advertising involves Internet sites attracting Internet users by having them click ads that appear to be from well-known brands. These sites can then potentially install spyware or viruses on the individual’s computer. Spyware is a program that is installed on the user’s computer without his or her knowledge. The program can then store the individual’s passwords or data and send them to outside sources. This consequence of deceptive online advertising could financially ruin the Internet user if the spy-ware user can access bank passwords or Social Security numbers. Therefore, it’s important for Internet users to realize that advertisers are attempting to deceive the users online as well as in everyday life, and individuals should be cautious when clicking advertisements on the web. Source: Linda Rosencrance, “E-Commerce Leaders Move to Fight Deceptive Online Ads,” ComputerWorld.com, August 5, 2008, http://www.computerworld.com/s/article/9111682/E_commerce_leaders_move_to_fight_deceptive_online_ads Page 615 FTC Actions against Deceptive Advertising If the FTC takes actions against a company and proves the

advertising is deceptive, the FTC may issue a cease-and-desist order. To go a step beyond cease-and-desist orders, the FTC may also issue multiple-product orders. A multiple-product order is a form of cease-and-desist order the FTC issues that applies not only to the product that was the subject of the action but also to other products produced by the same firm. Alternatively, the FTC may require the company to engage in corrective advertising (or counteradvertising), running advertisements in which the company explicitly states that the formerly advertised claims were untrue. The rationale for corrective advertising is that consumers who saw the previous ads will see the new ads; the new ads will then correct the deceptive advertising. In a commission decision regarding the deceptive advertising of Doan's Pills, Commissioner Sheila Anthony described the characteristics of a situation requiring corrective advertising: Requiring the dissemination of a truthful message to counteract beliefs created or reinforced by a respondent's deceptive message is an appropriate method of restoring the status quo ante and denying a respondent the ability to continue to profit from its deception. . . . Corrective advertising is an appropriate remedy if (1) the challenged ads have substantially created or reinforced a misbelief; and (2) the misbelief is likely to linger into the future.4 Page 616 However, some companies—and even one of the commissioners of the FTC—argued that corrective advertising is a form of compelled speech and thus violates the First Amendment right to engage in free speech. Telemarketing and Electronic Advertising Consumer law, like all law, is dynamic, and technology is often a driving force of change in consumer law. Although technological developments provide consumers with a host of benefits, these developments are often prone to abuses not covered by existing consumer law. For example, telephones and fax machines facilitate fast and inexpensive communication around the world, but telemarketers can use these technologies to deceive consumers and invade their privacy. Hence, lawmakers have passed new laws to address these issues. Two major acts regulate advertising by telephone and fax, the Telephone Consumer Protection Act (TCPA) of 1991 and the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994.5 TCPA, which the Federal Communications Commission (FCC) enforces, forbids phone solicitation using an automatic telephone dialing system or a prerecorded voice. TCPA also makes it illegal to transmit advertisements by fax unless the recipient agrees to the fax transmission. TCPA allows consumers to obtain a private right to legal action. In other words, the act gives consumers the right to recover for their losses. If a telemarketer violates TCPA, the consumer can recover either monetary losses or $500 per violation. However, if the telemarketer willfully

violated the act, the court can decide to triple the amount owed to the consumer. Data Mining and Privacy The availability of huge amounts of electronic data has resulted in an understandable desire on the part of governments and marketers to access and use this data for national security and enhanced sales, respectively. Citizens and consumers often rebel at the thought that their personal information and communications are being used by governments and corporations; they see such data mining as an invasion of their privacy. The Constitution Project, a bipartisan think tank, has thoroughly analyzed the conflicting interests in its 2010 booklet, Preserving Civil Liberties in the Information Age.6 The culmination of their study was a list of guidelines that they offered to data miners. Studying a few of their suggestions provides future business managers with an introduction to this area of legal tension. Exhibit 25-2Principles for the Development of Data Mining Programs Prior to acquisition, clearly articulate, in writing, the purpose(s) of data acquisition and the intended use(s) of that data. Create a comprehensive data mining Plan (“Plan”) covering data sources, data acquisition, system design and capabilities, and intended uses. Perform an internal evaluation of the program’s expected effectiveness, costs, benefits, compliance with existing law, and impact on civil liberties and constitutional values. Establish and enforce penalties for misuse and abuse of data mining programs by operators or others. Data Integrity and Security: Incorporate technical and administrative measures to limit access to or availability of personal data, particularly sensitive or personally identifiable data. Evaluate and improve data security, integrity, accuracy, and timeliness on a regular basis, including the use of audit trails. Conduct training and evaluation for employees with access to personal data or data mining systems. Data Appropriateness/Minimization: Ensure that acquisition only includes data relevant to the purpose of the program and minimize the extent to which databases are aggregated. Set limited retention periods and ensure complete destruction of expired data. Consumers are often in the dark about the extent to which their behavior is tracked and used. They have no idea that each purchase is charted and the information is then sold to marketers. Page 617 For example, in Vermont, the legislature became so aroused about the selling of prescription information to data mining companies that they passed a statute in 2007 prohibiting pharmacies from engaging in this practice. Drug manufacturers who bought the information from data mining firms would urge their salespeople to use the information to convince physicians to prescribe more of the manufacturers’ costly brand-name drugs. The prescription information purchased from the data miners enabled the manufacturers to target particular physicians who were not prescribing their

drugs or who were prescribing competing drugs. On June 23, 2011, the United States Supreme Court, in Sorrell v. IMS Health Inc., determined that this statute violated the free speech clause of the First Amendment. The Court reasoned that the state may not burden the speech of others to tilt public debate in a particular direction. E-COMMERCE and the Law navigating around misleading advertising on the Internet has always been a tricky process, but new innovations in AI have made it even harder. The FTC recently sent a report to Congress concerning the rise of “social media bots.” Bots are automated software that perform actions using a set of algorithms. Social media bots run on social media platforms and have their own accounts which they use to make posts and otherwise simulate human behavior. Advertisers can use these bots to spread misinformation regarding their products, drown out negative reviews with hundreds of positive reviews generated by bots, and increase the number of clicks an ad receives to increase revenues. The FTC reports that an incredible 37 percent of all Internet traffic is generated by bots, and 90 percent of this bot traffic is used for commercial purposes. We seem to be entering a new age of deceptive advertising on the Internet, and consumers need to be especially wary of trusting the ads they see on a daily basis. Source: Sarah Robertson, FTC Report on Social Media Bots and Deceptive Advertising, JD Supra (Oct. 14, 2020) https://www.jdsupra.com/legalnews/ftc-report-on-social-media-bots-and-48242/. As technology becomes more sophisticated, marketers will be increasingly tempted to take advantage of the rich data they will have available to channel their marketing efforts. Courts and legislatures will be negotiating this thorny issue for many years. Business leaders need to watch and learn as this conflict unfolds. Page 618 The Federal Communications Commission (FCC) has an important role to play in the emerging threats to consumer privacy. In his first 100 days, President Donald Trump signed a bill that repealed Internet privacy rules established by the FCC in 2016. These FCC guidelines had not gone into effect, but would have given consumers greater control over what Internet service providers (ISPs) can do with the personal data of their respective users. The repealed guidelines required ISPs to disclose to their users what information and data was being collected and to receive affirmative consent from consumers before selling their data. Supporters of the repeal argued that the FCC regulations put ISPs at a disadvantage because the FCC regulations did not apply to other companies that collect consumer data, like Google or Facebook. Under the new legislation, ISPs may continue to collect data like geolocation, browsing history, and other important personal information. Data mining provides a significant source of revenue for ISPs when they sell data to online

advertising agencies. These advertising agencies use the data that the ISPs collected to tailor advertisements to specific consumers, based on each consumer’s internet browsing history. GLOBAL Context Digital Archive Japan/Alamy Stock Photo Advertising Law in China For many years, advertising in China has been regulated by the People’s Republic of China Advertising Law. However, in 2009, China’s State Administration for Industry and Commerce (SAIC), the regulatory authority for advertising and marketing, released a Draft Revised Law for advertising regulation. This Draft Revised Law would include heavier restrictions on permissible advertising in China. For example, under the Draft Revised Law of China, false advertising is defined as: Material inconsistencies between the representations made in the advertisement and actual fact. Concealing key information or providing misleading information about the product being advertised. False statements concerning the prizes or awards that may be obtained upon purchasing a product or service. Fabricating the experience of other participants with the products. Although the Draft Revised Law mirrors legislation in the United States that regulates deceptive advertising, one major difference between the two countries is that neither the Chinese Draft Revised Law nor the original People’s Republic of China Advertising Law mention the type of person that a misleading or deceptive advertisement would affect. For example, as you learned earlier in this chapter, in the United States, advertisements cannot contain a material misrepresentation or omission that is likely to mislead a reasonable consumer. The Draft Revised Law does not contain any such specifications. Sometimes laws are ineffective in achieving their goals, however, so legislatures draft new laws to supplement existing laws. Thus, even though the goals of consumer laws may not change, specific rules and provisions do. For example, despite the protection of TCPA, consumers still lost an estimated $40 billion in telemarketing fraud after the act went into effect. To give consumers more protection against deceptive and abusive telemarketing practices, Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994.7 Through this act, Congress asked the FTC to define “deceptive and abusive” telemarketing practices and required the FTC to create and enforce rules governing telemarketing that would prohibit such practices. Consequently, the FTC created the Telemarketing Sales Rule of 1995, which requires telemarketers to (1) identify the call as a sales call; (2) identify the product name and seller; (3) tell the total cost of goods being sold; (4) notify the listener or reader of whether the sale is nonrefundable; and (5) remove the consumer’s name from the potential contact list if the consumer so requests.8 Moreover, the FTC established that certain telemarketing behaviors are abusive, such

as using profane or obscene language toward a customer and calling a person who previously requested to be taken off the particular seller’s calling list. In addition, if the telemarketer calls a residence before 8 a.m. or after 9 p.m., the telemarketer is engaging in abusive behavior. If a telemarketer violates the rule, the FTC or the state attorney general may bring an action against the telemarketer. If the action is successful, the telemarketer can face fines up to $10,000 per violation. Page 619 While reviewing and amending the Telemarketing Sales Rule in 2002, the FTC created a Do Not Call registry. The FTC states that the purpose of the Do Not Call registry is to give consumers a choice regarding telemarketing calls. The registry makes it illegal for telemarketers to call any number that has been registered for more than 31 days. The registration lasts for five years, and it can be completed online through the FTC’s website. Both the FTC and the FCC are responsible for maintaining the list, with help from local state law enforcement officials. Spam is a major problem for consumers because it comprises around 90 percent of all email messages. Over the latter portion of 2007 and the majority of 2008, the spam organization Herbalking was responsible for sending consumers billions of messages over the Internet. At one time, Herbalking was behind one-third of all Internet spam. To send such a substantial amount of email, Herbalking used software that infected computers, usually without the knowledge of the owners. In fact, estimates indicate that the Herbalking spam group used as many as 35,000 computers, a network capable of sending 10 billion email messages a day. The spam group actually pulled in $400,000 from Visa charges during one month, and the group had ties to five countries. Such facts make this spam operation perhaps the most extensive spam setup the FTC has ever come across. The Can-Spam Act of 2003 states that spammers may not send email messages containing false information or provide consumers with no option concerning whether they receive messages in the future. In October 2008, the Federal Trade Commission successfully convinced a Chicago court to freeze the assets and shut down the extensive Herbalking spam network for violating the act. Tobacco Advertising The tobacco industry’s advertising is regulated through two acts: the Public Health Cigarette Smoking Act9 of 1970 and the Smokeless Tobacco Health Education Act10 of 1986. The Public Health Cigarette Smoking Act prohibits radio and television cigarette advertisements, and the Smokeless Tobacco Act imposes the same restrictions for smokeless tobacco ads.

Labeling and Packaging Laws LO 25-3 Recall the purpose of the federal laws that regulate product labeling and packaging. When consumers examine a product to decide whether to buy it, the label often influences the decision to purchase. For example, many of us have purchased food because the label said the food was low fat. Unfortunately, manufacturers can include or omit information on labels that misleads consumers. Consequently, federal and state governments have passed laws that regulate product labeling. These laws generally require the manufacturer to provide accurate, understandable information on the label. Furthermore, if the product is potentially harmful, the manufacturer must make the consumer aware of the harm. Several federal laws regulate product labeling. The Wool Products Labeling Act of 1939 requires accurate labeling of wool products.11 Similarly, the Fur Products Labeling Act of 1951 requires the accurate labeling of fur products.12 The Flammable Fabrics Act of 1953 makes it illegal to produce or distribute clothing “so highly flammable as to be dangerous when worn.”13 The Fair Packaging and Labeling Act of 196614 requires products to carry labels that identify the product and provide specific information about the contents, such as the quantity of the contents and the size of a serving, if the number of servings is stated. Moreover, under this act, food product labels must show the nutritional content of the product. Similarly, the Nutrition Labeling and Education Act of 1990 requires standard nutrition information (i.e., calories and fat) to be provided on food labels.15 Furthermore, this act defines the words fresh and low fat. In 1994, the FTC issued a statement saying that it would apply these label restrictions to food advertising to prevent deceptive advertising. Thus, not only do sellers need to be concerned about the use of high, low, and light on labels, but they are also required to use these words in particular ways in advertisements. Page 620 While the FTC has specifically regulated some terms used on labels, others, like the popular “all-natural” or “100% natural,” often ride the line between puffery and deceptive advertising. For example, the 2014 case In re Hain Celestial Seasonings Prods. Consumer Litig., involved a class of consumers suing Hain Celestial Group for falsely labeling its teas as 100% natural even though they contained traces of pesticides. In response to the allegations, Hain claimed that the 100% natural label was mere puffery. The court disagreed with Hain and argued that 100% natural is a verifiable term that could be proven false with evidence of any amount of artificial chemicals. Therefore, the label was deceptive and not merely puffery. However, in a 2013 case against Hain, a judge dismissed deceptive advertising claims regarding “natural” body wash and lotion produced by Hain. According to the judge, a reasonable consumer would not believe that the products were

“produced by nature” because these products are not natural by definition. The goal of these laws is to provide consumers with specific information about product content. However, Congress has passed several laws that require information about the potential harms associated with a product. For example, the Federal Hazardous Substances Act of 1960 requires all items containing dangerous substances, such as corrosive or flammable chemicals, to carry warning labels. The Act has been amended to include other hazardous products such as fireworks or child toys that have electrical or thermal dangers. Canada’s cigarette labeling requirements are even more stringent than the U.S. requirements. In Canada, approximately 40 percent of cigarette packaging must be devoted to health warnings.16 The Canadian Bureau of Tobacco Control, however, has proposed a new rule requiring manufacturers to dedicate 50 percent of cigarette packages to such warnings, which would include explicit pictures and images of mouth cancer or other severe diseases caused by cigarette use.17

Sales The FTC and other government agencies have the power to regulate sales. For example, the Federal Reserve Board of Governors has the power to govern credit provisions related to sales contracts through its Regulation Z.18 The FTC has created rules that govern specific types of sales in which the consumer is in a more vulnerable position compared to a consumer who walks into a traditional retail setting. This section examines FTC regulation of three of these uncommonly vulnerable commercial settings: door-to-door, telephone, and mail-order sales. Door-to-Door Sales Imagine that you hear a knock at your door, open it, and discover a salesperson for an Internet provider. The person who knocked knows that you have just purchased a computer and are interested in learning about the Internet. The salesperson explains the price of various programs by which you can become familiar with the Internet. You listen but decide that you would like to get additional information from an alternative provider. However, the salesperson is extremely pushy; to get the salesperson out of your house, you decide to purchase one of his plans. In most door-to-door sales, the consumer does not have a chance to compare products and services to find the best service for their money. In addition, many consumers find it difficult to escape a salesperson in their homes. It is much easier to walk out of a store. Because the consumer is in a particularly vulnerable position in a door-to-door sale, the FTC has created special rules for such sales. The FTC created the Cooling-Off Rule, giving consumers three days to cancel purchases they make from salespeople who come to their homes. Moreover, the salesperson must notify

the consumer, both verbally and in writing, that the sales transaction may be canceled. The FTC rule also requires the consumer to be notified in writing in the same language in which the oral negotiations were conducted, thereby preventing unscrupulous businesses from taking advantage of non-English speakers. Page 621 The following case provides an example of the kinds of pressures that the FTC is trying to offset: Consolidated Promotions offered consumers a free gift for setting up a meeting in their home to discuss Consolidated products. This in-home meeting was in fact a sales pitch for Consolidated's photography packages, which included film and discounted photo processing. These packages cost from $1,200 to $2,500. When Consolidated Promotions refused to cancel some of the consumers' contracts, the FTC approved a complaint and referred it to the Department of Justice. The FTC alleged that the company violated the Cooling-Off Rule by "(1) failing to honor valid cancellation notices; (2) misrepresenting consumers' rights to cancel their contracts; and (3) failing to inform each buyer orally of his or her right to cancel the order."19 The FTC proposed that Consolidated Promotions enter into a consent decree whereby Consolidated would be required to send notice to all customers who bought a photography package after July 1, 1996, giving them an opportunity to cancel their contracts. Telephone and Mail-Order Sales Telephone and mail-order purchases trigger more complaints than do traditional retail or door-to-door sales. Suppose the office manager of a small accounting firm ordered five new chairs for the office through a catalog. The writing in the catalog indicated that the chairs would arrive within two weeks. The office manager called in the chair order, but six weeks later had heard nothing from the company. What rights does the manager have in this situation? The FTC originally addressed problems with mail-order sales through the 1975 Mail-Order Rule.20 The Mail or Telephone Order Merchandise Rule of 1993 amended the 1975 Mail-Order Rule to extend protections to consumers who purchase goods over phone lines, including through computers and fax machines. The 1993 rule established three key guidelines. First, sellers must ship items within the time promised. If they do not specify a time, the seller is limited to 30 days from receipt of the order. Second, if the seller cannot ship the item within the promised time, the seller must notify the customer in writing and offer an opportunity to cancel. Third, if a customer decides to cancel the order, the seller must refund the customer's money within a specified period of time. Unsolicited Merchandise When a consumer goes to their mailbox only to discover that a company has sent them a book, must they pay for the book? Anyone who receives unsolicited merchandise may treat the item as a gift. The recipient may keep or dispose of the

merchandise without any obligation to the sender. In accordance with the Postal Reorganization Act of 1970, any unsolicited merchandise sent by mail is free to be used by the recipient as they see fit with no obligation by the recipient to the sender.21 BUT WHAT IF? . . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? Let’s say in the Case Opener that customers call Trudeau with questions about his weight loss plan and he tells them he will send them information. He ends up mailing them his weight loss book and charging them for it. What kind of sales is this called? Is it legal? FTC Regulation of Sales in Specific Industries In certain industries, sellers have extensive opportunities to take advantage of customers. Thus, the FTC —and in some cases, Congress—creates special rules for certain sales practices specific to certain industries. Used-Car Sales Consumers who purchase a used car often have very little information about the car’s history. For instance, they do not know whether the car has been in an accident or whether there are any serious problems that are not visible. Page 622 To protect used-car buyers, Congress passed the Odometer Act of 1973, which protects against odometer fraud in used-car sales. The FTC extended that act’s protection through the 1984 Used Motor Vehicle Registration Rule.22 Under this rule, a dealer must attach a buyer’s guide label to any used car they are attempting to sell. The label must state that the car is being sold as is. This label is a warning to the customer that the seller is not guaranteeing anything at all about the performance of the car. Furthermore, the label must include a suggestion for the buyer to obtain an inspection for the used car before any decision to purchase. Consumer protections against fraud in used-car sales vary widely from state to state. During the 1960s and 1970s, there was widespread pressure to reform our legislative system to protect consumers from fraud; many states responded more favorably to that pressure than did others. All states enacted the Uniform Commercial Code (UCC), but in each case, the UCC was enacted with significant variations. The difference between states was also heightened in that each state had unique nonuniform consumer protection statutes. Consequently, the consumer protection laws against used-car fraud (also known as lemon laws) vary from state to state. Some states provide minimum protection, whereas other states, such as Minnesota, presume that one unsuccessful effort to repair a used car demonstrates nonrepairability. Minnesota’s laws also extend statutory protection to potential buyers of returned vehicles by banning resale of automobiles returned because of major safety defects.23 Funeral Home Services Consumers who must purchase goods and services for a funeral and burial are often vulnerable for several reasons. The consumer is usually preoccupied with his or her loss of a relative or friend and is unlikely

to comparison shop. In addition, grieving consumers can be more readily persuaded to purchase unnecessary, expensive items for this last tribute to their loved ones. To prevent funeral homes from taking advantage of these customers, the FTC created the 1984 Funeral Rule and revised it in 1994. The rule requires those who operate funeral homes to provide customers with itemized price information about funeral goods and services. Furthermore, funeral homes may not misrepresent legal or cemetery requirements or require the customer to buy certain funeral goods and services as a condition for receiving other funeral goods and services. Real Estate Sales Because real estate purchases are probably one of the largest purchases a consumer will make, Congress passed several acts requiring sellers to disclose certain information about the property. First, the Interstate Land Sales Full Disclosure Act, passed in 1968, requires disclosure of information to consumers so that they can make informed decisions about real estate purchases.24 Under this act, anyone planning to sell or lease 100 or more lots of unimproved land through a common promotional plan must file an initial statement of record with the Department of Housing and Urban Development's (HUD's) Office of Interstate Land Sales Registration. Before the developer can offer land for sale, HUD must approve the initial statement. Congress provided more protection for people purchasing homes in the Real Estate Settlement Procedures Act of 1974 and its 1976 amendments.25 This act requires the disclosure of information regarding mortgage loans to the buyer. For example, the lender must give the buyer an estimate of the costs for finalizing the real estate purchase. Online Sales With the ever-expanding reach of the Internet, there has been an increase in business-to-consumer (B2C) sales transactions. Anyone with an Internet connection can make purchases from his or her favorite stores, from Barnes & Noble to Macy's. Most existing consumer protection laws were developed to protect consumers in their interactions with businesses face-to-face. Hence, protecting consumers online requires new approaches. Although not a specific industry, the Internet facilitates such a huge volume of commerce that additional focused protective legislation is needed. Despite the difficulty of prosecuting online fraud, the FTC has brought a number of enforcement actions against online businesses. The federal statutes already in existence prohibiting wire fraud apply to online transactions. In addition, several states have begun to amend statutes to protect online consumers explicitly.

Credit Protection LO 25-4 Describe the different acts that provide credit protection. The widespread use of credit to purchase goods and services means that consumer credit protection has become increasingly important. This section explores three key federal laws regulating the credit industry to protect consumers: the Truth in Lending Act, the Fair Credit Reporting Act, and the Fair Debt Collection Practices Act. The Truth in Lending Act One of the earliest, most significant statutes regulating credit is Title I of the Consumer Credit Protection Act (CCPA), referred to as the Truth in Lending Act (TILA).26 The purpose of the act is to require sellers to disclose the terms of the credit or loan to help consumers compare a variety of credit lines or loans. More important, consumers must be able to understand this disclosure of terms. TILA is administered, in part, by the Federal Reserve Board through the previously mentioned Regulation Z. Suppose your business extends credit to customers. Are your credit lines through your business subject to TILA? First, TILA applies to consumer loans only. Second, TILA applies to those who lend money or arrange for credit through the ordinary course of business. Third, the credit or loan must be in the amount of $25,000 or less, unless the loan is secured by a mortgage on real estate. Fourth, the creditor must be making the loan to a natural person, not a legal entity. Fifth, the credit or loan must be subject to a finance charge or must have repayments of more than four installments. All creditors subject to TILA must disclose the finance charge and the annual percentage rate of the credit or loan. This information must be disclosed in a meaningful way, which prevents creditors from burying the information in a large paragraph unrelated to the credit terms. Consider the following example: In May 1999, a jury heard Carlisle v. Whirlpool Financial National Bank.27 According to the case facts, Gulf Coast Electric’s salespeople traveled door to door, selling satellite dishes through financing. The price of the satellite dish was $1,100. However, consumers could purchase this dish for approximately $200 in stores. The consumers argued that the salespeople hid the number of payments the buyers would have to pay, thereby violating TILA. The jury found in favor of the customers and awarded them $581 million. Types of Loans under TILA TILA includes three categories of loans: open-end credit, closed-end credit, and credit card applications and solicitations. Each category has specific disclosure requirements. For example, an open-end credit line permits repeated transactions and assesses a finance charge on unpaid balances. A creditor of an open-end credit line is required to disclose information in periodic statements. In contrast, a closed-end credit line is one for a loan given for a specific amount of time. The creditor of a closed-end credit line must disclose the total amount financed and the number, amount, and due dates of

payments. Finally, credit card applications and solicitations must include the annual percentage rate (APR), annual fees, and the grace period for paying without a finance charge. Unauthorized Charges and Disputes TILA establishes certain consumer protection rules regarding unauthorized charges to credit cards. If your credit card is stolen and someone makes unauthorized purchases on your account, your liability for those charges cannot exceed $50 per card if prompt notification of the theft is made to the credit card company. If you notify the credit card company before unauthorized charges are made, you cannot be held liable for any of the charges. Similarly, if a credit card company sends you an unsolicited card in the mail and the card is stolen, you cannot be held liable for any of the charges. Page 624 TILA offers another protection to consumers who unknowingly purchase damaged goods using a credit card. If three requirements are met, consumers will not be obligated to pay for the goods. First, the consumer must purchase the item near her home (i.e., the business is in the same state as the consumer's home or within 100 miles of the home). Second, the item must cost more than $50. Third, the consumer must make a good-faith effort to resolve the dispute, such as asking the store for a refund. If these requirements are met, the credit card company cannot bill the consumer for the damaged item. Consumer Leasing Act In 1988, the Consumer Leasing Act (CLA) amended TILA to provide greater protection for people leasing automobiles and other goods.28 CLA applies to those who lease goods as part of their regular business. For CLA to apply, the lease must be for a minimum of four months and the price must not exceed $25,000. Under CLA and its controlling regulation, Regulation M, anyone leasing goods must disclose up front, in writing, all the material terms and conditions of the lease.29 Equal Credit Opportunity Act In the 1970s, a woman old enough to have children would have had difficulty securing credit because creditors believed that married women with children would be less likely to pay their debts. In response to this discrimination, Congress passed the Equal Credit Opportunity Act (ECOA) as a 1974 amendment to TILA.30 This amendment makes it illegal for creditors to deny credit to individuals on the basis of race, religion, national origin, color, sex, marital status, or age. When determining the creditworthiness of a credit applicant, the creditor cannot use information about the applicant's marital status, nor can the creditor require a spouse to co-sign the application. Finally, the act prohibits creditors from denying credit on the basis of whether the applicant receives public assistance benefits. The Fair Credit Reporting Act If you own a credit card, you also have a credit report. If you apply for a new credit card or a loan, the creditor will check your credit history to make a judgment about

your creditworthiness by examining a copy of your credit report. This report contains information about your financial transactions, such as payments on credit, debt collection, and other financial information the creditor needs to know about if entering a business transaction with you. CASE Nugget What Does the Law Require of a Loan Company? Alvin Ricciardi, Appellant, v. Ameriquest Mortgage Company U.S. Court of Appeals for the Third Circuit 164 Fed. Appx. 221 (2006) Alvin Ricciardi bought a home in May 2001, took out a home equity loan, and then applied for a loan to refinance the two mortgages through Ameriquest. Ricciardi closed the loan in September 2002, at which point he received the “Borrower’s Acknowledgment of Final Loan Terms” acknowledgment. The acknowledgment stated the terms of the loan that Ricciardi had originally requested as well as the final terms of the loan. Ricciardi signed all the documents presented during the closing. Eight months later, Ricciardi filed suit against Ameriquest for violating the Equal Credit Opportunity Act, the Truth in Lending Act, and the Pennsylvania Unfair Trade Practices Act and Consumer Protection Law. The district court granted summary judgment regarding Ricciardi’s ECOA claim, finding for Ameriquest. At a later nonjury trial, the court ruled in favor of Ameriquest on all counts of Ricciardi’s claim as well as Ameriquest’s counterclaim. Ricciardi appealed. Ricciardi’s appeal put forth three arguments. First, Ricciardi argued that the district court erred in granting summary judgment in favor of Ameriquest on his ECOA claim because Ameriquest failed to provide notice of its counteroffer before the closing of the loan. Second, Ricciardi argued that the district court erred in its adverse credibility finding. Third, Ricciardi argued that Ameriquest violated TILA by overcharging him for insurance and thereby gave him the right to rescind the loan. The appeals court rejected each of Ricciardi’s arguments, affirming the ruling of the district court. The appeals court addressed each of Ricciardi’s arguments in turn. First, TILA requires a creditor to respond to an applicant within 30 days of receipt of a completed loan application. Ameriquest did respond to Ricciardi within 30 days. Contrary to Ricciardi’s claim, Ameriquest was not required to respond in the form of a counteroffer. In addition, there is no requirement for a counteroffer to be received before the closing of the loan. Thus, Ricciardi’s argument was without merit. Second, the appeals court found that the district court had not erred in its adverse credibility finding. Ricciardi contradicted himself numerous times on the record, in addition to committing fraud by misrepresenting his occupation and income on the loan application to Ameriquest. Third, the appeals court found that Ricciardi had not presented sufficient evidence to substantiate his claim that Ameriquest had overcharged him for insurance. In Pennsylvania, state-mandated insurance

rates are published in the Rate Manual. The rates decrease if the property is being refinanced and was previously insured. Ricciardi failed to show that the property was previously insured; thus, the district court correctly found no evidence that Ameriquest had overcharged Ricciardi. Page 625 FCRA establishes other duties for credit reporting. For example, a credit bureau cannot report obsolete information. (General credit information is considered obsolete after seven years.) However, a bankruptcy will be reported for 10 years. Also, any time a credit applicant is denied credit, the applicant has a right to the name and address of the credit bureau that reported the information. Finally, FCRA imposes a duty on the reporting agency to ensure that its information is as accurate as possible. Consequently, if a consumer reports an error in his or her credit report, the credit bureau is required to investigate the error and make the corrections in the report if necessary. The Fair Debt Collection Practices Act Suppose a consumer owes $3,000 on his credit card and has not been able to make monthly payments for the past six months. The credit card company will likely refer the case to a collection agency, which will notify the consumer in an attempt to get him to pay the debt. The collection agency then may start calling the consumer regularly to discuss the debt. Next, the agency might start contacting the consumer's acquaintances, telling them about the debt in an effort to pressure the consumer into paying the debt. This type of debt-collecting behavior is prohibited by the Fair Debt Collection Practices Act (FDCPA).31 This act applies only to debt collectors who regularly attempt to collect debts on behalf of others. The following collection behaviors are expressly prohibited by FDCPA: Contacting a debtor at work if the debtor's employer objects. Contacting a debtor who has notified the collection agency that they want no contact with the agency. Contacting the debtor before 8 a.m. or after 9 p.m. Contacting third parties about the debt (exceptions: contacting the debtor's parents, spouse, or financial adviser). Using obscene or threatening language when communicating with the debtor. Misrepresenting the collection agency as a lawyer or a police officer. Page 626 Case 25-2 provides an analysis of an application of the "least sophisticated consumer" standard for interpreting the scope of consumer protection statutes, as it applies to the Fair Debt Collection Practices Act. CASE 25-2 Crawford v. LVNV FUNDING, LLC United States Court of Appeals, Eleventh Circuit 758 F.3d 1254 (2014) FACTS: Stanley Crawford owed $2,037.99 to the Heilig-Meyers furniture company. Heilig-Meyers charged off the debt in 1999, and, in September 2001, a company affiliated with the defendant in this case, LVNV Funding LLC, acquired the debt. On October 2004, the debt became unenforceable due to Alabama's statute of limitations and because the last transaction on the debt

occurred three years earlier in October 2001. On October 2, 2008, Crawford filed for Chapter 13 bankruptcy in Alabama. During the proceeding, LVNV filed a proof of claim to collect the Heilig-Meyers debt, despite the fact that the statute of limitations had expired four years prior. Crawford filed a counterclaim against LVNV, alleging that LVNV filed stale claims as a routine business practice and that attempting to claim the Heilig-Meyers debt violated the FDCPA. The bankruptcy judge dismissed Crawford's adversary claims, and the district court affirmed the decision. Crawford appealed once again to the U.S. Court of Appeals in May 2013. ISSUE: Using the "least-sophisticated consumer" standard, does the Fair Debt Collection Practices Act disallow the attempt to collect a debt when the claim is time-barred? REASONING: The initial step of the Court's reasoning was to make it clear that it was going to rely on statutory interpretation. Thus, the first thing it did was review relevant parts of the governing law, the FDCPA, to see whether the statute is consistent with Crawford's claim. The Court said it found "abundant evidence" of the kind of practices that Congress wanted to stop, namely, "the use of abusive, deceptive, and unfair debt collection practices." 15 U.S.C. § 1692(a). To enforce the FDCPA's prohibitions, Congress equipped consumer debtors with a private right of action, rendering "debt collectors who violate the Act liable for actual damages, statutory damages up to $1,000, and reasonable attorney's fees and costs." Section 1692e of the FDCPA provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." Section 1692f states that "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." Given the ambiguity of "unfair" and "unconscionable," the Court adopted a "least-sophisticated consumer" standard to evaluate whether a debt collector's conduct is "deceptive," "misleading," "unconscionable," or "unfair" under the statute. The inquiry is not whether the particular plaintiff-consumer was deceived or misled; instead, the question is "whether the 'least sophisticated consumer' would have been deceived" by the debt collector's conduct. The reason behind LVNV's practice of filing time-barred proofs of claim in bankruptcy court is simple. Absent an objection from either the Chapter 13 debtor or the trustee, the time-barred claim is automatically allowed against the debtor pursuant to 11 U.S.C. § 502(a)-(b) and Bankruptcy Rule 3001(f). As a result, the debtor must then pay the debt from his future wages as part of the Chapter 13 repayment plan, notwithstanding that the debt is time-barred and unenforceable in court. Neither the bankruptcy trustee nor Crawford objected to the claim by LVNV to collect the debt during the bankruptcy proceeding; instead, the trustee actually paid monies from the

Chapter 13 estate to LVNV (or its surrogates) for the time-barred debt. It wasn’t until four years later, in May 2012, that debtor Crawford—with the assistance of counsel—objected to LVNV’s claim as unenforceable. A debt collector’s filing of a time-barred proof of claim creates the misleading impression to the debtor that the debt collector can legally enforce the debt. The “least sophisticated” Chapter 13 debtor may be unaware that a claim is time-barred and unenforceable and thus fail to object to such a claim. Given the Bankruptcy Code’s automatic allowance provision, the otherwise unenforceable time-barred debt will be paid from the debtor’s future wages as part of his Chapter 13 repayment plan. DECISION AND REMEDY: The Court concluded that LVNV’s filing of the proof of claim fell well within the ambit of a “representation” or “means” used in “connection with the collection of any debt.” It was an effort “to obtain payment” of Crawford’s debt “by legal proceeding.” In fact, payments to LVNV were made from Crawford’s wages as a result of LVNV’s claim. And, it was Crawford—not the trustee—who ultimately objected to defendants’ claim as time-barred. Our conclusion that §§ 1692e and 1692f apply to LVNV’s proof of claim is consistent with the FDCPA’s definition of a debt-collector as “any person who . . . regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6) (emphasis added). SIGNIFICANCE OF THE CASE: The Court is interpreting the FDCPA in a manner that makes it clear that the consumer protection statute here is not to protect an average consumer, but rather the vulnerable consumer. CRITICAL THINKING What ambiguity is central to this case? Do you agree with the way the court interpreted the ambiguous word or phrase? Can you think of an alternative reasonable definition? ETHICAL DECISION MAKING Who are the primary stakeholders affected by the court’s ruling? Does the appeals court have a stronger ethical obligation to elevate the interests of some stakeholders over others? Explain. Page 627 The Credit Card Fraud Act Credit card fraud is a serious problem in the United States, costing consumers millions of dollars per year. Accordingly, Congress passed the Credit Card Fraud Act of 1984 to close existing loopholes in federal laws that allowed credit card fraud to be pervasive.32 The Credit Card Fraud Act states that it is unlawful to (1) possess an unauthorized credit card, (2) counterfeit or alter a credit card, (3) use the account number of another’s credit card to perpetuate fraud, and (4) use a credit card obtained from a third party with their consent, even if the third party conspires to report the card as stolen. The act also increases the penalty for committing credit card fraud. The Fair Credit Billing Act Did your credit card company fail to extend your credit when it informed you that your credit would be extended? Were you ever

charged for merchandise you did not purchase or receive? Were you ever charged twice for one purchase? If so, you have been the victim of a credit billing error. The Fair Credit Billing Act (FCBA) of 1986 was created to handle such billing errors and many others.33 FCBA, enforced by the FTC, creates procedures consumers are to follow in filing complaints when billing errors occur. FCBA also requires the creditor to explain to the consumer and FTC why the error occurred and promptly fix the error. When a complaint is filed, the creditor may not try to collect on the disputed amount or take any action against the consumer until the complaint is answered. The Fair and Accurate Credit Transactions Act The Fair and Accurate Credit Transactions Act (FACTA) of 2003 was passed in response to the growing number of identity-theft cases.34 If someone thinks they are a victim of identity theft, they may contact the FTC, and an alert will be placed in his credit files. The credit files then serve as a national fraud alert system to enhance authorities' ability to catch those who are stealing identities. Several other requirements created by the act protect consumers. First, major credit reporting agencies are required to provide consumers with a free copy of their credit reports every 12 months. Second, receipts from credit card purchases are to list an abbreviated version of the card number to protect consumer accounts. Third, financial institutions must work with the FTC to red-flag suspicious transactions that might be a sign of identity theft. Fourth, assistance will be provided to victims of identity theft to help them rebuild their credit. Fifth, victims of identity theft may report fraud directly to creditors to protect their credit ratings. Page 628 The Credit Card Holders' Bill of Rights Act Under FACTA, the three major agencies required to provide credit reports are Experian, Equifax, and TransUnion. Some websites or other credit bureaus have claimed to provide free credit reports, such as freecreditreport.com, but there is only one authorized site for government-required free credit reports from the three agencies: AnnualCreditReport.com. A visitor of the site may receive one free report per year, but the three agencies make money in other ways, such as providing credit numbers or additional reports in a year. The FTC fined freecreditreport.com more than once during the Bush administration. The dishonest website claimed to give consumers a free credit report and then charged consumers who signed up for a report. Advertisements that deceive consumers about free credit reports are subject to more than mere wrist slaps now that the Credit Card Holders' Bill of Rights Act was signed by President Obama on May 22, 2009. Because of this act, the FTC may produce new rules that make free credit report advertisers affirm that only AnnualCreditReport.com provides free credit reports to consumers. The act, also known as the CARD Act, has four provisions that

target unfair credit card practices. The first provision mandates the adjustment of several credit practices. First, creditors are required to notify consumers of changes to fees and interest rates before such changes take place. Furthermore, contractual agreements must be made with clients if fees and interest rates are to be changed at all. Second, the limits of fees and interest rates of all credit companies will be strictly regulated by the FTC to avoid unfairly high maximums. Third, penalty fees such as late fees and over-the-limit fees must have reasonable maximums. The second provision of the CARD Act covers notification and information. First, creditors must notify consumers about payoff timing. Second, all billing statements must conspicuously display whether and when the interest rate will increase. Third, creditors must inform consumers, up front, about the dates on which payments are considered late and the interest rates associated with late payments. Fourth, creditors must post all conditions associated with each credit arrangement option on the Internet. The last part of the provision modifies deceptive advertising associated with free credit reports. The CARD Act's third provision prohibits credit card companies from extending credit offers to anyone under 21. Consumers under 21 may acquire credit only with a co-signer and proof of sufficient income. The third provision also blocks creditors from using tangible items to persuade college-age consumers to apply for credit. This provision also requires creditors to submit an annual report to a federal review board. Specifically, the annual report must include three pieces of information: (1) all memorandums or agreements between creditors and institutions of higher education, (2) the total number of payments and payment amounts creditors make to institutions of higher education, and (3) the number of credit accounts opened under an agreement between a credit card company and an institution of higher education per year. The fourth provision of the CARD Act contains three directives. First, consumers will be charged fees for dormant or inactive gift cards. Second, only one fee per month may be charged to a consumer with a gift card that is inactive for 12 months. Third, gift cards, prepaid cards, and gift certificates must inform customers of three conditions before purchase: the existence of the dormancy fee, the amount of the dormancy fee, and the frequency of the dormancy charge.

Consumer Health and Safety LO 25-5 Describe the different laws that help ensure consumer health and safety. The legislation and rules we have

examined regulate the advertising, labeling, and sale of products. Now we turn to legislation regarding product safety. The purpose of such regulations is to ensure that companies such as Firestone and Ford produce safe products for consumers who do not have all the information. The two main federal statutes that address product safety are the Federal Food, Drug, and Cosmetic Act and the Consumer Product Safety Act. Page 629 The Federal Food, Drug, and Cosmetic Act In 1906, Congress created the first federal legislation regulating food and drugs, the Pure Food and Drugs Act. Subsequently, Congress amended the Pure Food and Drugs Act when it created the Federal Food, Drug, and Cosmetic Act (FFDCA) in 1938 to protect consumers against misbranded or adulterated food, drugs, medical devices, or cosmetics.35 The U.S. Food and Drug Administration (FDA), the agency responsible for administering FFDCA, creates standards to regulate food and drugs, thus protecting consumers. Specifically, the FDA must ensure that food, drugs, cosmetics, and medical devices meet specific safety standards. Case 25-3 examines the regulatory scope of the FFDCA. CASE 25-3 UNITED STATES v. KAPLAN, United States Court of Appeals, Ninth Circuit 836 F. 3D 1199 (2016) FACTS: Doctor Michael Kaplan was a urologist who owned and operated two urology clinics in Henderson and Las Vegas, Nevada. Both clinics regularly performed prostate needle biopsies. The procedure is used to collect prostate tissue sample to examine for disease. To complete the prostate needle biopsy, an ultrasound probe is inserted into a patient’s rectum to locate the prostate, after which a hollow needle is used to penetrate the rectal wall and gather the needed tissue sample. To help stabilize the needle, an enclosure which houses it, called a needle guide, is used. Needle guides come in reusable stainless steel which must be sterilized or in single-use disposable plastic forms. Kaplan’s clinics had used a stainless steel needle guide with a corresponding sterilizing machine until December 2010, when the machine broke. Because of time constraints, the sales representative Kaplan worked with, Timothy Brandt, arranged to send disposable plastic guides to the clinics. By January 2011, both clinics were low on plastic needle guides and additional shipments were on backorder. Kaplan instructed his medical assistant supervisor at the Henderson clinic to tell the medical assistants to sterilize the plastic needle guides using the same protocol they had previously used for the stainless steel needle guide. Medical assistants noticed blood and pinkish water left in the plastic needle guides after the sterilization process. Assistants also noticed brown scratches that would not come clean and noted that they could tell a used plastic needle guide from a new one due to its discoloration. In March 2011, Kaplan’s medical assistants reported him to the Nevada State Medical Board.

Following an investigation, a grand jury indicted Kaplan in October 2013 on two counts. The relevant count charged Kaplan with conspiracy to commit adulteration in violation of the FDCA. In September 2014, a jury found Kaplan guilty of conspiring to commit adulteration and a final judgment for a 48-month prison sentence was entered in May 2015. Kaplan appealed, contending that he could not be criminally prosecuted under the FDCA. ISSUE: Can Kaplan be criminally prosecuted under the FDCA? REASONING: The FDCA is intended to protect consumers from dangerous products. It contains a provision that covers products “held for sale.” Kaplan argued that the phrase “held for sale” is different from “held for use.” Kaplan contended because title and possession of the needle guides were not transferred to patients, there was no sale and thus the use of the guides during biopsies falls outside of the FDCA. The court disagreed, however. It argued that “held for sale” has a broader meaning than the one Kaplan assigns to it and that it focuses on “the commercial nature of the transaction, actors, and products.” The court argued that the single-use nature of the guides is meant to be “consumed” in treating a patient similar to a single-use drug. Thus, when a physician uses a single-use medical device on a patient and the device is then disposed of, the device is “held for sale” provided that there is a commercial relationship between the doctor and the patient. The court found that Kaplan knowingly endangered public health in his practices and that the FDCA does apply. DECISION: Affirmed. SIGNIFICANCE: This case shows that the FFDCA can apply even in cases where traditional “products” and “sales” may not seem to be involved. CRITICAL THINKING How does this case increase your appreciation for the role that ambiguity plays in the interpretation of laws? ETHICAL DECISION MAKING How does this case demonstrate that the freedoms of businesses are in conflict with the freedoms of consumers? Page 630 The Food and Drug Administration Modernization Act of 1997 amended FFDCA to help improve the regulation process, particularly for drugs and medical devices. For example, the 1997 act reauthorized a drug program that cut the time required for a drug review from 30 months to 15 months. The act also increased patient access to experimental drugs and accelerated the review of important new medications. The Consumer Product Safety Act In the Consumer Product Safety Act of 1972, Congress created and directed the Consumer Product Safety Commission (CPSC) to “protect the public against unreasonable risks of injuries and deaths associated with consumer products.”36 The CPSC protects the public from injuries associated with consumer products in several ways. First, the CPSC issues and enforces mandatory standards regarding product safety. Similarly, the commission works with industries to

develop voluntary product standards. If the CPSC cannot establish a standard that would adequately protect the public, it can ban consumer products from the market. In addition, the CPSC can administer existing product safety legislation. Examples of such legislation include the Child Protection and Toy Safety Act of 196937 and the Federal Hazardous Substance Act of 1960.38 Second, the CPSC can arrange for a recall of products. Although the CPSC has the authority to issue product recalls on its own, usually the CPSC works with companies that are voluntarily issuing recalls for dangerous products. For example, in August 2006, both Dell and Apple issued voluntary recalls, with the help of the CPSC, for lithium ion batteries sold in their laptops. Both companies received several separate complaints about their batteries overheating; thus, the CPSC aided the companies in the battery recall. Third, the commission conducts research regarding potentially hazardous products. The National Highway Traffic Safety Administration (NHTSA) is similar to the CPSC in that it, too, conducts investigations about the safety of potentially hazardous products. The NHTSA, however, focuses primarily on motor vehicles. The NHTSA was the agency that investigated the Ford/Firestone case to determine exactly what was causing the tire blowouts in Ford Explorers. Fourth, the CPSC educates consumers about product safety. One important way the CPSC offers this education is through the National Injury Information Clearinghouse. Page 631 This section examined two of the most significant laws governing the safety of consumer products. Exhibit 25-3 lists six additional consumer product safety laws. Exhibit 25-3Other Consumer Protection Laws STATUTE PURPOSE Pure Food and Drugs Act of 1906 (amended by the Federal Food, Drug, and Cosmetic Act) Forbids the adulteration and mislabeling of food and drugs Meat Inspection Act of 1906 Provides for meat inspection Wholesome Meat Act of 1967 Amended the Meat Inspection Act to promulgate standards for animal slaughter for meat Flammable Fabrics Act of 1953 Prohibits the sale of highly flammable clothing Child Protection and Toy Safety Act of 1969 Requires childproof devices and toy labeling Toy Safety Act of 1984 Permits the Consumer Product Safety Commission to recall toys and other articles children use Drug-Price Competition and Patent-Term Restoration Act of 1984 Simplifies the Food and Drug Administration’s process of approving generic drugs CASE OPENER WRAP-UP Deceptive Advertising and the Ultimate Weight-Loss Cure To determine that Trudeau misled consumers, the court reasoned that Trudeau failed to mention a single aspect of his weight-loss protocol. Further, the court found that Trudeau painted a picture of a safe and easy diet, when in reality the diet had extreme restrictions. Trudeau’s selective quotations misled consumers because they created a false image of the diet. The FTC

preferred that Trudeau reimburse all consumers who purchased his book via the infomercial—a remedy that would have resulted in over $46 million in reimbursements. Alternatively, the FTC asserted that, at the very least, Trudeau should disgorge his profits, estimated at around $12 million. In the end, the court required Trudeau to pay the FTC a little over $5.1 million. PRACTICAL TIPS for Business Managers While it may be tempting to tout your products beyond their abilities, the Bayer example shows why this can be a costly mistake in terms of both time and money. Always advertise your products accurately. While puffing is allowed, make sure the claim is clearly a joke or an exaggeration or you may find yourself in trouble. Product recalls can be very expensive and can tarnish the reputation of your business. Instead of rushing a product out the door, it is usually a better idea to take your time to fully test it for defects to avoid spending more money on a recall later. As this chapter explains, there are many different types of making sales and each one generally has its own set of rules attached to it. Before trying to make a certain type of sale, be sure you know any regulations attached to it so that you do not violate the law in the process.

SUMMARY The Federal Trade Commission How the FTC brings an action: FTC conducts an investigation. FTC sends a complaint to the violator. FTC and the violator settle the complaint through a consent agreement. If the company refuses to enter the consent agreement, the FTC may issue a formal administrative complaint, which leads to an administrative hearing. If the company has violated the law, the FTC issues a cease-and-desist order. If the company violates the order, the FTC can seek an injunction against the company or fine the company up to $10,000 per violation. Deceptive Advertising Bait-and-switch advertising: Advertising a low price to bait the consumer into the store only so that the salesperson can switch the consumer to another, higher-priced item. FTC actions against deceptive advertising: Cease-and-desist actions: Court orders requiring firms to stop their current advertising behavior. Multiple-product orders: Court orders requiring firms to stop current advertisements on numerous products, as opposed to one specified product. Corrective advertising: Advertising in which the company explicitly states that the formerly advertised claims were untrue. Telemarketing and electronic advertising: 1991 Telephone Consumer Protection Act: Telemarketers cannot use an automatic telephone dialing system or a prerecorded voice. Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994: This act created certain requirements regarding when and how telemarketers may make calls. Federal Do Not Call

registry: Telemarketers cannot call consumers who have voluntarily placed their phone numbers on the federal Do Not Call list. Tobacco advertising: Cigarette and smokeless-tobacco advertising is restricted. Labeling and Packaging Laws Federal and state governments have passed laws requiring manufacturers to provide accurate, understandable information on labels. Furthermore, if a product is potentially harmful, the manufacturer must make the consumer aware of the harm. Sales Door-to-door sales: The Cooling-Off Rule gives consumers three days to cancel purchases they make from salespeople who come to their homes. Telephone and mail-order sales: The Mail or Telephone Order Merchandise Rule of 1993 extends protections to those who purchase over the phone or by fax. Unsolicited merchandise: Anyone receiving such merchandise may treat it as a gift. FTC regulation of specific industries: Used-car sales Funeral home services Real estate sales Online sales Credit Protection The Truth in Lending Act requires sellers to disclose the terms of the credit or loan to facilitate the consumer's comparison of a variety of credit lines or loans. The Fair Credit Reporting Act ensures accurate credit reporting. The Fair Debt Collection Practices Act regulates the actions of debt collectors that regularly attempt to collect debts on behalf of others. The Credit Card Fraud Act closes loopholes in federal laws to punish people further who commit credit card fraud. The Fair Credit Billing Act seeks to rectify problems and abuses associated with credit billing errors. The Fair and Accurate Credit Transactions Act takes affirmative actions to control and prosecute identity theft. Consumer Health and Safety The Federal Food, Drug, and Cosmetic Act protects consumers against misbranded or adulterated food, drugs, medical devices, and cosmetics. The Consumer Product Safety Act created the Consumer Product Safety Commission (CPSC) to "protect the public against unreasonable risks of injuries and deaths associated with consumer products."

Point/Counterpoint Should Prescription Drugs Be Allowed to be Advertised Directly to Consumers? YES NO The question of whether DTCA should be legal has been a heated debate in many countries. DTCA can be a great tool for informing consumers and improving lives, and should remain legal in the United States for several reasons. One reason DTCA should be allowed is that it can inform consumers about diseases they may have and possible treatments for those diseases. Being that the ads in question are prescription drug ads, DTCA also encourages consumers to seek help from their doctors before using the drug. DTCA can educate consumers about illnesses they may or may not have realized they were suffering from and encourage them

to seek treatment and improve their lives. Another benefit of DTCA is that, like any other form of advertisement, it gets the word out about a product (in this case, prescription drugs) which can lead to more sales for the pharmaceutical companies that produce them. More sales leads to more revenue, which can be used to research new and better life-improving medications. In effect, the advertising of today can save lives tomorrow. Perhaps one of the most straightforward reasons as to why DTCA should remain legal is that it should be allowed as protected free speech. Ford and Chrysler can advertise their new cars, so why can't pharmaceutical companies advertise their new legal, FDA-approved, life-improving drugs? The First Amendment should protect DTCA as it does almost all other forms of advertisement. The advertisement of prescription drugs represents a potential threat to consumers everywhere. In fact, direct-to-consumer drug advertisement (DTCA) has been deemed so unsafe that every country besides the United States and New Zealand has banned it outright. There are many reasons why DTCA should be banned in the United States as well. First, DTCA ads can misinform consumers and can lead to consumers misdiagnosing themselves. A 2013 study published in the Journal of General Internal Medicine found that 55 percent of claims made in DTCA were "potentially misleading," while 2 percent were "false." DTCA can mislead consumers to request drugs and seek treatment for diseases that the ads lead them to believe they have, which in turn can mean adverse medical results from taking unnecessary medications. Second, drugs are often advertised through DTCA before their long-term health effects are fully known. Contrary to the belief of many consumers, drugs can be advertised and sold before long-term safety trials have been completed. The drug Vioxx was marketed, requested by patients and prescribed before being taken off the market after being linked to over 4,500 deaths related to strokes and heart attacks induced by the drug. Consumers aren't the only people being negatively affected by DTCA, either. A large portion of medical doctors have reported having patients request advertised drugs that were inappropriate for their treatment, and many of these doctors have felt pressured to prescribe the inappropriate drugs. And even if a doctor refuses to prescribe the drug, a 2013 study found that 50 percent of patients were "disappointed" in their doctors for refusing to prescribe an advertised drug and 25 percent of patients surveyed would try to convince the doctor to give them the drug or acquire the drug somewhere else. Not even wary doctors can prevent consumers from falsely medicating themselves as a result of DTCA.

Questions & Problems What is the goal of the FTC, and how does it achieve its goal? What are some pieces of legislation that enable the FTC to achieve its goal? What are the elements of a deceptive advertisement, and how does the FTC prove an ad is deceptive? What are the main provisions of the Truth in Lending Act, and how does it aid consumers? On June 27, 2012, Abigail Strubel opened a Victoria's Secret brand credit card to purchase an item for $19.99. The card was issued by Comenity Bank and the credit card agreement provided by Comenity disclosed certain consumer rights under the Truth in Lending Act. On June 27, 2013, Strubel filed a class action against Comenity Bank seeking statutory damages under the TILA for problems in the disclosures contained in the credit card agreement. Strubel's contended that Comenity failed to disclose four items: Failing to clearly disclose that "(1) cardholders wishing to stop payment on an automatic payment plan had to satisfy certain obligations; (2) the bank was statutorily obliged not only to acknowledge billing error claims within 30 days of receipt but also to advise of any corrections made during that time; (3) certain identified rights pertained only to disputed credit card purchases for which full payment had not yet been made, and did not apply to cash advances or checks that accessed credit card accounts; and (4) consumers dissatisfied with a credit card purchase had to contact Comenity in writing or electronically." The district court granted Comenity's motion for summary judgment and Strubel appealed. For each of the four claims alleged by Strubel, write who the appellate court rule in favor of and what its reasoning was. Source: Strubel v. Comenity Bank, 842 F. 3d 181 (2016). Fresh, Inc., is a cosmetics and skin care manufacturer. One of its product lines is Sugar Lip Treatment (Sugar), a lip balm. Sugar is a lip balm treatment that comes in various shades of color and comes in an oversized dispenser tube. Each tube of Sugar retails at stores and online at $22.50 to $25.00. Angela Ebener, a California resident that purchased tubes of Sugar over the four years preceding the trial, sued Fresh for deceptive advertising. Ebener asserted that she was led to believe there was more product than the packaging indicated because only 75 percent of the product was reasonably accessible. The remaining 25 percent was blocked by the tube's screw mechanism. Furthermore, although the Sugar tube label stated there was 4.3 grams of product, a metallic weight at the base of the tube combined with packaging box itself made the whole package weigh approximately 29 grams. Ebener argued that the extra weight misled her to think there was more product than there actually was. The district court ruled against Ebener, citing that

California’s Safe Harbor doctrine and federal preemption under the FDCA were fatal to her claims. Ebener appealed and the Ninth Circuit Court took the case and affirmed the district court decision. What is the Safe Harbor Doctrine and federal preemption under the FDCA according to the appellate court and how did they interact with California’s deceptive advertising laws to lead to the case’s conclusion? Do you think it is ethical for Fresh to label Sugar as having 4.3 grams of lip balm when only three-fourths of it is accessible? Source: Ebner v. Fresh, Inc., 838 F. 3d 958 (2016). In June 2013, Paul M. Stelmachers took a taxi cab ride in Las Vegas, Nevada, and paid for the cab fare with his credit card. A VeriFone Systems Inc. product was used to receive payment in the taxi cab. Stelmachers noticed that the computer generated receipt displayed more than the last five digits of his credit card. In November 2014, Stelmachers filed an instant class action suit against VeriFone, asserting that VeriFone had violated the Fair and Accurate Credit Transaction Act of 2003. VeriFone responded by filing a motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6). In its motion, VeriFone stated three arguments, (1) FACTA does not prohibit merchants from printing the first digit of a credit card number; (2) Plaintiff cannot plausibly allege that VeriFone willfully violated FACTA, and thus cannot seek statutory damages; and (3) Plaintiff sued the wrong party because FACTA does not apply to point-of-sale system providers like VeriFone. What do you think of VeriFone’s argument? Which argument did the court deem most important and why? How did the court rule? Explain the court’s reasoning. Source: Stelmachers v. VeriFone Systems, Inc., 2015 U.S. Dist. LEXIS 163857. Page 635Hewlett-Packard, a U.S.-based company, is famous for its reliable laptop computers and printers. Wilson purchased an HP Pavilion Notebook computer in the summer of 2004 for approximately $1,500. In the fall of 2006, over two years after its purchase and shortly after the limited warranty expired, Wilson’s laptop began to display low-power warnings and would run on battery power even when plugged into an AC adapter. Wilson alleges that the problem became worse until he “was unable to utilize the laptop at all.” When Wilson contacted HP about his laptop in or about December 2006, HP informed him that his warranty had expired on August 15, 2006, and that he could return the laptop to HP and have his motherboard replaced for over $400, plus shipping and taxes. He opted to have his battery and AC adapter changed for $150, to no effect. Wilson then proceeded to sue, in early 2009, claiming that HP had not disclosed the defect to its consumers. The case was later dismissed after it was presented that the laptop stopped working outside of its warranty span. One day, Wilson turned his laptop on, and it began to smoke and emit fire. When Wilson sued again, he received the same results.

Furthermore, the court stated that “complaint’s allegations were insufficient to plausibly allege a defect in the HP laptop computers that creates an unreasonable safety risk.” Do you believe that HP violated consumer safety law? Why or why not? [Wilson v. Hewlett-Packard Co., 10-16249, (9th Cir. 2012).] Source: Wilson v. Hewlett-Packard Co., 10-16249, (9th Cir. 2012). Comcast Corporation is a worldwide cable company that provides cable services to businesses and individual consumers. In Philadelphia, the company purchased some of its competitors, which increased the percentage of its local ownership to about 75 percent. In early 2003, six individual Comcast customers sued the company, claiming that they paid too much for their cable service as a result of its recent acquisition. What aspects of consumer law does this case involve? [Behrend v. Comcast Corp., 655 F.3d 182, 185 (3d Cir. 2011).] Source: Behrend v. Comcast Corp., 655 F.3d 182, 185 (3d Cir. 2011). On May 5, 2006, Rex Gilbert executed an adjusted rate note with First National Arizona to refinance the existing lien on his home in Ocracoke, North Carolina. Thereafter, First National Arizona transferred its interests in the Gilberts’ mortgage to First National Bank of Nevada, First National Nevada transferred its interests to Residential Funding LLC (RFL), and RFL sold its interests to Deutsche Bank Trust Company Americas, as the trustee for Residential Accredit Loans Inc. (RAL). GMAC Mortgage LLC is the subservicer. The Gilberts defaulted on their loan in 2008, and, on March 12, 2009, David Simpson, acting as the substitute trustee for Deutsche, filed a foreclosure action against the Gilberts in the Hyde County Superior Court. On April 5, 2009, the Gilberts’ counsel wrote a letter to GMAC alleging violations of TILA and providing notice that the Gilberts were rescinding the mortgage transaction. GMAC replied, informing the Gilberts that they had not found any basis that would give rise to an extended right of rescission. On September 14, 2009, while their appeal was pending, the Gilberts filed suit in the Hyde County Superior Court, seeking to enjoin the mortgage foreclosure sales and to rescind their May 6, 2006 loan. The defendants removed the suit to the district court and the district court granted the defendants’ motion to dismiss. However, in light of new evidence, the Gilberts filed a motion for relief pursuant to Rule 60(b) with the district court. On June 15, 2011, the district court filed an order stating that should the Fourth Circuit return jurisdiction to this court, the court would grant the Rule 60(b) motion, dismiss the federal claims for the reasons stated in the July 7, 2010, order (dismissing all of the Gilberts’ claims), and remand all state-law claims to Hyde County Superior Court. The Gilberts subsequently filed a motion with the Fourth Circuit U.S. appeals court to reverse and remand the case to the district court. The Gilberts argued that the district court erred in dismissing

their TILA claim on the basis that they had failed to exercise their extended right to rescind in a timely manner. The question at hand is if a borrower must file a lawsuit within three years of closing the loan or if the borrower must only assert his or her right to rescind through a written notice. What arguments can you make for each side? How did the Fourth Circuit court decide on this matter, and what was its reasoning? [Gilbert v. Residential Funding LLC, 678 F. 3d 271 (2012).] Source: Gilbert v. Residential Funding LLC, 678 F. 3d 271 (2012). Penny Morris took metoclopramide from early 2006 to July 2008. However, ingesting the drug for more than twelve weeks had already been contraindicated on FDA-approved labels since 2004 and by "black box" labeling since 2009. Morris developed tardive dyskinesia and akathisia, two movement disorders, as a result of taking the medication and filed suit against generic drug manufacturers PLIVA, TEVA, and Actavis, asserting theories of defective construction and composition of the drug, defective design, breach of express warranty, and inadequate warning. The suit was subsequently stayed to await the Supreme Court's decision in Mensing, which held that while state-law "failure to warn" claims are allowed against brand name manufacturers, they were preempted by federal laws against generic manufacturers. The district court took into account the Supreme Court decision and dismissed the complaint. Morris moved the district court under Rule 59(e) to amend its earlier ruling based on four assertions: (1) Appellant PLIVA failed to comply with the 2004 FDA-approved label change; (2) the generic defendants failed to properly test their products and report that information; (3) breach of express warranty; and (4) Appellant TEVA may be held liable for a "failure to warn" because of its status as a reference listed drug (RLD) holder. Page 636What is the "duty of sameness" as defined by the court, and how is it relevant in this case? The court cites the FDCA to show that Morris's claim that "the generic defendants failed to test and inspect the product according to federal law" failed. "[A]ll such proceedings for the enforcement, or to restrain violations of [the FDCA] shall be by and in the name of the United States." Why would legislatures limit claims that manufacturers failed to properly test their drugs to the government? Who are the relevant stakeholders in this case, and how would such a limitation affect the stakeholders? [Morris v. Pliva, Inc., 713 F. 3d 774 (2013).] Source: Morris v. Pliva, Inc., 713 F. 3d 774 (2013). Verisign, Inc. is a long established tech company that sells Internet domain names. Verisign also runs popular .com and .net top-level domains. In 2014, XYZ.COM, LLC entered the domain business and launched a new top-level domain ending in ".xyz." Verisign subsequently sued XYZ and its founder, Daniel Negari. At the heart of this case is not XYZ's upstart desire to compete with Verisign, but in

the alleged false advertisement that XYZ engaged in to market itself. Some of the allegations of improper marketing included blog posts where Negari touted .xyz's high registration numbers and popularity. Another supposedly misleading marketing statement was when XYZ paraphrased an interview between NPR and Negari, stating that an NPR reporter described ".xyz—the Next .com." In addition to the accusations of exaggerated claims, Verisign also contended that XYZ had falsely disparaged the .com domain, against Verisign's interests. For example, Negari said of .com domains in the NPR interview that "[a]ll of the good real estate is taken." The district court granted summary judgment to XYZ, proclaiming that Verisign had failed to establish a violation of the Lanham Act on a number of grounds. The district court reasoned that statements like "all of the good real estate is taken" and "it's impossible to find the domain name that you want," were not false or misleading and amounted to puffery. Additionally, the district court stated that even if the statements were false or misleading, it did not violate the Lanham Act unless it deceived consumers. Do you think the quoted statements should be considered to be puffery? Why do you think false statements are not actionable unless it deceives consumers? How would a plaintiff alleging false advertising prove to the court that consumers have been deceived? [Verisign, Inc. v. XYZ. COM LLC, 848 F. 3d 292 (2017).] Source: Verisign, Inc. v. XYZ. COM LLC, 848 F. 3d 292 (2017). Upsher–Smith manufactures a generic form of the prescription drug amiodarone hydrochloride (amiodarone). The FDA approved amiodarone in its brand-name formulation as a drug of last resort for patients suffering from ventricular fibrillation and ventricular tachycardia, both life-threatening heartbeat irregularities. As a generic manufacturer of amiodarone, Upsher–Smith has an ongoing duty to ensure that it includes the same labeling approved for its brand-name counterpart. One of those labeling requirements is to make Medication Guides available for distribution to each patient with each prescription, by providing them—or the means to produce them—to distributors, packers, or authorized dispensers of the drug. Medication Guides explain the approved uses of a drug and its side effects to a patient "in nontechnical, understandable language" that is clearly presented in at least 10-point font. The Medication Guide for amiodarone warns patients that the drug "should only be used in adults with life-threatening heartbeat problems called ventricular arrhythmias." Lung damage is listed as a "serious side effect" of taking the drug, along with related symptoms such as shortness of breath and wheezing. Because "the medicine stays in your body for months after treatment is stopped," these adverse effects may continue even after ceasing treatment. Rita McDaniel, Johnny's widow, sued Upsher–

Smith on behalf of her late husband’s estate. In general, she alleges that her husband died in July 2015 because he had been taking amiodarone. More specifically, Johnny’s doctor prescribed him a course of amiodarone to treat his non-life-threatening atrial fibrillation. Johnny apparently did not receive the corresponding Medication Guide when he filled his prescriptions in May and June 2015 because Upsher–Smith neglected to ensure its availability. Thus, he was unaware that only adults with life-threatening heartbeat problems who had unsuccessfully sought alternative treatments should take the drug. McDaniel sued on multiple theories under Tennessee law: strict-liability failure-to-warn, negligent failure-to-warn, and negligence-per-se claims. The failure-to-warn claims are premised solely on Upsher–Smith’s failure to provide a Medication Guide. Upsher–Smith moved to dismiss for failure to state a claim. The district court granted Upsher–Smith’s motion and dismissed the failure-to-warn claims with prejudice, holding that they were impliedly preempted under the FDCA. The court explained that McDaniel failed to cite any Tennessee duty paralleling the federal duty to provide a Medication Guide. Said differently, the claims would not exist in the absence of the FDCA. What is the “duty of sameness” as defined by the court, and how is it relevant in this case? Who are the relevant stakeholders in this case? How did the court rule? Source: McDaniel v. Upsher–Smith Laboratories, Inc., 893 F. 3d 941 (6th Cir. 2018). Page 637Linda and Christopher Gunn fell behind in paying assessments owed to their homeowners’ association. When the debt reached about $2,000, the association hired a law firm (Thrasher, Buschmann & Voelkel). It sent the Gunns a letter demanding payment. One sentence in this letter reads: “If Creditor has recorded a mechanic’s lien, covenants, mortgage, or security agreement, it may seek to foreclose such mechanic’s lien, covenants, mortgage, or security agreement.” This letter did not induce the Gunns to pay, and the law firm filed suit in state court–but the remedy it sought was damages for breach of contract rather than foreclosure. The Gunns replied with this suit under the Fair Debt Collection Practices Act (FDCPA), part of which forbids false or misleading statements in dunning letters.Although the Gunns acknowledge that the letter’s statement is true both factually and legally, they contend that it must be deemed false or misleading because the law firm would have found it too costly to pursue foreclosure to collect a $2,000 debt. The Gunns’ main argument is that they were annoyed or intimidated by the letter, which means that they were injured and eligible for relief under the FDCPA. What do you think of the Gunns’ claims? Is the letter “false or misleading” because it threatens something the Gunns are sure the law firm will not actually do? Is being “annoyed or intimidated” by a letter

like the one sent to the Gunns entitle one to relief under the FDCPA? How did the court rule? Source: Gunn v. Thrasher, Buschmann & Voelkel, P.C., No. 19-3514 (7th Cir. 2020).

Appendix A The Constitution of the United States of America Preamble We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. Article I Section 1 All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. Section 2 The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen. Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.1 The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative, and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three. When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies. The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment. Section 3 The Senate of the United States shall be composed

of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.2 Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.3 No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen. The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided. The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States. The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present. Page A-1 Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law. Section 4 The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.4 Section 5 Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide. Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and with the Concurrence of two thirds, expel a Member. Each House shall keep a Journal of its Proceedings, and from

time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal. Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting. Section 6 The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place. No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office. Section 7 All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law. Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of

Representatives, according to the Rules and Limitations prescribed in the Case of a Bill. Section 8 The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States. To borrow Money on the credit of the United States; To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures; To provide for the Punishment of counterfeiting the Securities and current Coin of the United States; To establish Post Offices and post Roads; To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; To constitute Tribunals inferior to the supreme Court; Page A-2 To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. Section 9 The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation,

not exceeding ten dollars for each Person. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. No Bill of Attainder or ex post facto Law shall be passed. No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.5 No Tax or Duty shall be laid on Articles exported from any State. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another. No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time. No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State. Section 10 No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress. No State shall, without the consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay. Article II Section 1 The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall

make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.6 Page A-3 The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States. No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States. In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.7 The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them. Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect, and defend the Constitution of the United

States.” Section 2 The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session. Section 3 He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States. Section 4 The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. Article III Section 1 The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office. Section 2 The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;— to Controversies between two or more States;—

between a State and Citizens of another State;8—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. Page A-4 In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury: and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed. Section 3 Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted. Article IV Section 1 Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof. Section 2 The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime. No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.9 Section 3 New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any

particular State. Section 4 The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence. Article V The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. Article VI All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation. The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States. Article VII The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same. Page A-5 Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names. Amendments [The first 10 amendments are known as the “Bill of Rights.”] Amendment I (Ratified 1791) Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. Amendment 2 (Ratified 1791) A well regulated Militia,

being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed. Amendment 3 (Ratified 1791) No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law. Amendment 4 (Ratified 1791) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Amendment 5 (Ratified 1791) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. Amendment 6 (Ratified 1791) In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have assistance of counsel for his defence. Amendment 7 (Ratified 1791) In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. Amendment 8 (Ratified 1791) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Amendment 9 (Ratified 1791) The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. Amendment 10 (Ratified 1791) The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Amendment 11 (Ratified 1795) The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. Amendment 12 (Ratified 1804) The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be

an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as president, as in the case of the death or other constitutional disability of the President.10—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States. Page A-6 Amendment 13 (Ratified 1865) Section 1 Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2 Congress shall have power to enforce this article by appropriate legislation. Amendment 14 (Ratified 1868) Section 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws. Section 2 Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.11 Section 3 No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability. Section 4 The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void. Section 5 The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. Amendment 15 (Ratified 1870) Section 1 The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2 The Congress shall have power to enforce this article by appropriate legislation. Amendment 16 (Ratified 1913) The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration. Amendment 17 (Ratified 1913) The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures. When vacancies happen

in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution. Amendment 18 (Ratified 1919; Repealed 1933) Section 1 After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited. Page A-7 Section 2 The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation. Section 3 This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.12 Amendment 19 (Ratified 1920) The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation. Amendment 20 (Ratified 1933) Section 1 The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin. Section 2 The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day. Section 3 If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified. Section 4 The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the

persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them. Section 5 Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article. Section 6 This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission. Amendment 21 (Ratified 1933) Section 1 The eighteenth article of amendment to the Constitution of the United States is hereby repealed. Section 2 The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. Section 3 This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress. Amendment 22 (Ratified 1951) Section 1 No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term. Section 2 This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress. Amendment 23 (Ratified 1961) Section 1 The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment. Page A-8 Section 2 The Congress shall have power to enforce this article by appropriate legislation. Amendment 24 (Ratified 1964) Section 1 The right of citizens of the United States to vote in any primary or other

election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax. Section 2 The Congress shall have power to enforce this article by appropriate legislation. Amendment 25 (Ratified 1967) Section 1 In case of the removal of the President from office or of his death or resignation, the Vice President shall become President. Section 2 Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress. Section 3 Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President. Section 4 Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President. Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office. Amendment 26 (Ratified 1971) Section 1 The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. Section 2 The Congress

shall have power to enforce this article by appropriate legislation. Amendment 27 (Ratified 1992) No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

Appendix B Sarbanes-Oxley Act of 2002 Note: Only some sections are represented in this appendix. The full act can be found by accessing the instructor resources in Connect. Section 1. Short Title (a) Short Title. This Act may be cited as the “Sarbanes-Oxley Act of 2002.” Title I—Public Company Accounting Oversight Board Sec. 101. Establishment; administrative provisions. Sec. 102. Registration with the Board. Sec. 103. Auditing, quality control, and independence standards and rules. Sec. 104. Inspections of registered public accounting firms. Sec. 105. Investigations and disciplinary proceedings. Sec. 106. Foreign public accounting firms. Sec. 107. Commission oversight of the Board. Sec. 108. Accounting standards. Sec. 109. Funding. Title II—Auditor Independence Sec. 201. Services outside the scope of practice of auditors. Sec. 202. Preapproval requirements. Sec. 203. Audit partner rotation. Sec. 204. Auditor reports to audit committees. Sec. 205. Conforming amendments. Sec. 206. Conflicts of interest. Sec. 207. Study of mandatory rotation of registered public accounting firms. Sec. 208. Commission authority. Sec. 209. Considerations by appropriate State regulatory authorities. Title III—Corporate Responsibility Sec. 301. Public company audit committees. Sec. 302. Corporate responsibility for financial reports. Sec. 303. Improper influence on conduct of audits. Sec. 304. Forfeiture of certain bonuses and profits. Sec. 305. Officer and director bars and penalties. Sec. 306. Insider trades during pension fund blackout periods. Sec. 307. Rules of professional responsibility for attorneys. Sec. 308. Fair funds for investors. Title IV—Enhanced Financial Disclosures Sec. 401. Disclosures in periodic reports. Sec. 402. Enhanced conflict of interest provisions. Sec. 403. Disclosures of transactions involving management and principal stockholders. Sec. 404. Management assessment of internal controls. Sec. 405. Exemption. Sec. 406. Code of ethics for senior financial officers. Sec. 407. Disclosure of audit committee financial expert. Sec. 408. Enhanced review of periodic disclosures by issuers. Sec. 409. Real time issuer disclosures. Title V—Analyst Conflicts of Interest Sec. 501. Treatment of securities analysts by registered securities associations and national securities exchanges. Title VI—Commission Resources and Authority Sec.

601. Authorization of appropriations. Sec. 602. Appearance and practice before the Commission. Sec. 603. Federal court authority to impose penny stock bars. Sec. 604. Qualifications of associated persons of brokers and dealers. Title VII—Studies and Reports Sec. 701. GAO study and report regarding consolidation of public accounting firms. Sec. 702. Commission study and report regarding credit rating agencies. Page B-2Sec. 703. Study and report on violators and violations. Sec. 704. Study of enforcement actions. Sec. 705. Study of investment banks. Title VIII—Corporate and Criminal Fraud Accountability Sec. 801. Short title. Sec. 802. Criminal penalties for altering documents. Sec. 803. Debts nondischargeable if incurred in violation of securities fraud laws. Sec. 804. Statute of limitations for securities fraud. Sec. 805. Review of Federal Sentencing Guidelines for obstruction of justice and extensive criminal fraud. Sec. 806. Protection for employees of publicly traded companies who provide evidence of fraud. Sec. 807. Criminal penalties for defrauding shareholders of publicly traded companies. Title IX—White-Collar Crime Penalty Enhancements Sec. 901. Short title. Sec. 902. Attempts and conspiracies to commit criminal fraud offenses. Sec. 903. Criminal penalties for mail and wire fraud. Sec. 904. Criminal penalties for violations of the Employee Retirement Income Security Act of 1974. Sec. 905. Amendment to sentencing guidelines relating to certain white-collar offenses. Sec. 906. Corporate responsibility for financial reports. Title X—Corporate Tax Returns Sec. 1001. Sense of the Senate regarding the signing of corporate tax returns by chief executive officers. Title XI—Corporate Fraud and Accountability Sec. 1101. Short title. Sec. 1102. Tampering with a record or otherwise impeding an official proceeding. Sec. 1103. Temporary freeze authority for the Securities and Exchange Commission. Sec. 1104. Amendment to the Federal Sentencing Guidelines. Sec. 1105. Authority of the Commission to prohibit persons from serving as officers or directors. Sec. 1106. Increased criminal penalties under Securities Exchange Act of 1934. Sec. 1107. Retaliation against informants. Sec. 302. Corporate Responsibility for Financial Reports. (a) Regulations Required. The Commission shall, by rule, require, for each company filing periodic reports under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)), that the principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions, certify in each annual or quarterly report filed or submitted under either such section of such Act that— (1) the signing officer has reviewed the report; (2) based on the officer’s knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under

which such statements were made, not misleading; (3) based on such officer’s knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the issuer as of, and for, the periods presented in the report; (4) the signing officers— (A) are responsible for establishing and maintaining internal controls; (B) have designed such internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to such officers by others within those entities, particularly during the period in which the periodic reports are being prepared; (C) have evaluated the effectiveness of the issuer’s internal controls as of a date within 90 days prior to the report; and (D) have presented in the report their conclusions about the effectiveness of their internal controls based on their evaluation as of that date; (5) the signing officers have disclosed to the issuer’s auditors and the audit committee of the board of directors (or persons fulfilling the equivalent function)— (A) all significant deficiencies in the design or operation of internal controls which could adversely affect the issuer’s ability to record, process, summarize, and report financial data and have identified for the issuer’s auditors any material weaknesses in internal controls; and (B) any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer’s internal controls; and (6) the signing officers have indicated in the report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses. Page B-3 (b) Foreign Reincorporations Have No Effect. Nothing in this section 302 shall be interpreted or applied in any way to allow any issuer to lessen the legal force of the statement required under this section 302, by an issuer having reincorporated or having engaged in any other transaction that resulted in the transfer of the corporate domicile or offices of the issuer from inside the United States to outside of the United States. (c) Deadline. The rules required by subsection (a) shall be effective not later than 30 days after the date of enactment of this Act. Sec. 306. Insider Trades during Pension Fund Blackout Periods. (a) Prohibition of Insider Trading during Pension Fund Blackout Periods. (1) IN GENERAL—Except to the extent otherwise provided by rule of the Commission pursuant to paragraph (3), it shall be unlawful for any director or executive officer of an issuer of any equity security (other than an exempted security), directly or indirectly, to purchase, sell, or otherwise acquire or transfer any equity security of the issuer (other than an exempted security)

during any blackout period with respect to such equity security if such director or officer acquires such equity security in connection with his or her service or employment as a director or executive officer. (2) REMEDY— (A) IN GENERAL—Any profit realized by a director or executive officer referred to in paragraph (1) from any purchase, sale, or other acquisition or transfer in violation of this subsection shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such director or executive officer in entering into the transaction. (B) ACTIONS TO RECOVER PROFITS—An action to recover profits in accordance with this subsection may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer fails or refuses to bring such action within 60 days after the date of request, or fails diligently to prosecute the action thereafter, except that no such suit shall be brought more than 2 years after the date on which such profit was realized. (3) RULEMAKING AUTHORIZED—The Commission shall, in consultation with the Secretary of Labor, issue rules to clarify the application of this subsection and to prevent evasion thereof. Such rules shall provide for the application of the requirements of paragraph (1) with respect to entities treated as a single employer with respect to an issuer under section 414(b), (c), (m), or (o) of the Internal Revenue Code of 1986 to the extent necessary to clarify the application of such requirements and to prevent evasion thereof. Such rules may also provide for appropriate exceptions from the requirements of this subsection, including exceptions for purchases pursuant to an automatic dividend reinvestment program or purchases or sales made pursuant to an advance election. (4) BLACKOUT PERIOD—For purposes of this subsection, the term “blackout period,” with respect to the equity securities of any issuer— (A) means any period of more than 3 consecutive business days during which the ability of not fewer than 50 percent of the participants or beneficiaries under all individual account plans maintained by the issuer to purchase, sell, or otherwise acquire or transfer an interest in any equity of such issuer held in such an individual account plan is temporarily suspended by the issuer or by a fiduciary of the plan; and (B) does not include, under regulations which shall be prescribed by the Commission— (i) a regularly scheduled period in which the participants and beneficiaries may not purchase, sell, or otherwise acquire or transfer an interest in any equity of such issuer, if such period is— (I) incorporated into the individual account plan; and (II) timely disclosed to employees before becoming participants under the individual account plan or as a subsequent amendment to the plan; or (ii) any suspension described in subparagraph (A) that is imposed solely in connection with persons

becoming participants or beneficiaries, or ceasing to be participants or beneficiaries, in an individual account plan by reason of a corporate merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor. (5) INDIVIDUAL ACCOUNT PLAN—For purposes of this subsection, the term “individual account plan” has the meaning provided in section 3(34) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(34), except that such term shall not include a one-participant retirement plan (within the meaning of section 101(i)(8)(B) of such Act (29 U.S.C. 1021(i)(8)(B))). (6) Page B-4NOTICE TO DIRECTORS, EXECUTIVE OFFICERS, AND THE COMMISSION—In any case in which a director or executive officer is subject to the requirements of this subsection in connection with a blackout period (as defined in paragraph (4)) with respect to any equity securities, the issuer of such equity securities shall timely notify such director or officer and the Securities and Exchange Commission of such blackout period. (b) Notice Requirements to Participants and Beneficiaries under ERISA. (1) IN GENERAL—Section 101 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1021) is amended by redesignating the second subsection (h) as subsection (j), and by inserting after the first subsection (h) the following new subsection: (i) Notice of Blackout Periods to Participant or Beneficiary under Individual Account Plan. “(1) DUTIES OF PLAN ADMINISTRATOR—In advance of the commencement of any blackout period with respect to an individual account plan, the plan administrator shall notify the plan participants and beneficiaries who are affected by such action in accordance with this subsection. “(2) NOTICE REQUIREMENTS— “(A) IN GENERAL—The notices described in paragraph (1) shall be written in a manner calculated to be understood by the average plan participant and shall include— “(i) the reasons for the blackout period, “(ii) an identification of the investments and other rights affected, “(iii) the expected beginning date and length of the blackout period, “(iv) in the case of investments affected, a statement that the participant or beneficiary should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets credited to their accounts during the blackout period, and “(v) such other matters as the Secretary may require by regulation. “(B) NOTICE TO PARTICIPANTS AND BENEFICIARIES—Except as otherwise provided in this subsection, notices described in paragraph (1) shall be furnished to all participants and beneficiaries under the plan to whom the blackout period applies at least 30 days in advance of the blackout period. “(C) EXCEPTION TO 30-DAY NOTICE REQUIREMENT—In any case in which— “(i) a deferral of the blackout period would violate the requirements of subparagraph (A) or (B) of section 404(a)(1), and a fiduciary

of the plan reasonably so determines in writing, or “(ii) the inability to provide the 30-day advance notice is due to events that were unforeseeable or circumstances beyond the reasonable control of the plan administrator, and a fiduciary of the plan reasonably so determines in writing, subparagraph (B) shall not apply, and the notice shall be furnished to all participants and beneficiaries under the plan to whom the blackout period applies as soon as reasonably possible under the circumstances unless such a notice in advance of the termination of the blackout period is impracticable. “(D) WRITTEN NOTICE—The notice required to be provided under this subsection shall be in writing, except that such notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient. “(E) NOTICE TO ISSUERS OF EMPLOYER SECURITIES SUBJECT TO BLACKOUT PERIOD—In the case of any blackout period in connection with an individual account plan, the plan administrator shall provide timely notice of such blackout period to the issuer of any employer securities subject to such blackout period. “(3) EXCEPTION FOR BLACKOUT PERIODS WITH LIMITED APPLICABILITY—In any case in which the blackout period applies only to 1 or more participants or beneficiaries in connection with a merger, acquisition, divestiture, or similar transaction involving the plan or plan sponsor and occurs solely in connection with becoming or ceasing to be a participant or beneficiary under the plan by reason of such merger, acquisition, divestiture, or transaction, the requirement of this subsection that the notice be provided to all participants and beneficiaries shall be treated as met if the notice required under paragraph (1) is provided to such participants or beneficiaries to whom the blackout period applies as soon as reasonably practicable. “(4) Page B-5CHANGES IN LENGTH OF BLACKOUT PERIOD—If, following the furnishing of the notice pursuant to this subsection, there is a change in the beginning date or length of the blackout period (specified in such notice pursuant to paragraph (2) (A)(iii)), the administrator shall provide affected participants and beneficiaries notice of the change as soon as reasonably practicable. In relation to the extended blackout period, such notice shall meet the requirements of paragraph (2)(D) and shall specify any material change in the matters referred to in clauses (i) through (v) of paragraph (2)(A). “(5) REGULATORY EXCEPTIONS—The Secretary may provide by regulation for additional exceptions to the requirements of this subsection which the Secretary determines are in the interests of participants and beneficiaries. “(6) GUIDANCE AND MODEL NOTICES—The Secretary shall issue guidance and model notices which meet the requirements of this subsection. “(7) BLACKOUT PERIOD—For purposes of this subsection— “(A) IN GENERAL—The term ‘blackout period’ means, in

connection with an individual account plan, any period for which any ability of participants or beneficiaries under the plan, which is otherwise available under the terms of such plan, to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain distributions from the plan is temporarily suspended, limited, or restricted, if such suspension, limitation, or restriction is for any period of more than 3 consecutive business days. “(B) EXCLUSIONS—The term ‘blackout period’ does not include a suspension, limitation, or restriction— “(i) which occurs by reason of the application of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934), “(ii) which is a change to the plan which provides for a regularly scheduled suspension, limitation, or restriction which is disclosed to participants or beneficiaries through any summary of material modifications, any materials describing specific investment alternatives under the plan, or any changes thereto, or “(iii) which applies only to 1 or more individuals, each of whom is the participant, an alternate payee (as defined in section 206(d) (3)(K)), or any other beneficiary pursuant to a qualified domestic relations order (as defined in section 206(d) (3)(B)(i)). “(8) INDIVIDUAL ACCOUNT PLAN— “(A) IN GENERAL—For purposes of this subsection, the term ‘individual account plan’ shall have the meaning provided such term in section 3(34), except that such term shall not include a one-participant retirement plan. “(B) ONE-PARTICIPANT RETIREMENT PLAN —For purposes of subparagraph (A), the term ‘one-participant retirement plan’ means a retirement plan that— “(i) on the first day of the plan year— “(I) covered only the employer (and the employer’s spouse) and the employer owned the entire business (whether or not incorporated), or “(II) covered only one or more partners (and their spouses) in a business partnership (including partners in an S or C corporation (as defined in section 1361(a) of the Internal Revenue Code of 1986)), “(ii) meets the minimum coverage requirements of section 410(b) of the Internal Revenue Code of 1986 (as in effect on the date of the enactment of this paragraph) without being combined with any other plan of the business that covers the employees of the business, “(iii) does not provide benefits to anyone except the employer (and the employer’s spouse) or the partners (and their spouses), “(iv) does not cover a business that is a member of an affiliated service group, a controlled group of corporations, or a group of businesses under common control, and “(v) does not cover a business that leases employees.” (2) ISSUANCE OF INITIAL GUIDANCE AND MODEL NOTICE—The Secretary of Labor shall issue initial guidance and a model notice pursuant to section 101(i)(6) of the Employee Retirement Income Security Act of 1974 (as added by this subsection) not later than January 1, 2003. Not later than

75 days after the date of the enactment of this Act, the Secretary shall promulgate interim final rules necessary to carry out the amendments made by this subsection. (3) CIVIL PENALTIES FOR FAILURE TO PROVIDE NOTICE— Section 502 of such Act (29 U.S.C. 1132) is amended— (A) in subsection (a) (6), by striking “(5), or (6)” and inserting “(5), (6), or (7)”; (B) by redesignating paragraph (7) of subsection (c) as paragraph (8); and (C) by inserting after paragraph (6) of subsection (c) the following new paragraph: “(7) Page B-6The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator’s failure or refusal to provide notice to participants and beneficiaries in accordance with section 101(i). For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.” (3) PLAN AMENDMENTS—If any amendment made by this subsection requires an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after the effective date of this section, if— (A) during the period after such amendment made by this subsection takes effect and before such first plan year, the plan is operated in good faith compliance with the requirements of such amendment made by this subsection, and (B) such plan amendment applies retroactively to the period after such amendment made by this subsection takes effect and before such first plan year. (c) EFFECTIVE DATE—The provisions of this section (including the amendments made thereby) shall take effect 180 days after the date of the enactment of this Act. Good faith compliance with the requirements of such provisions in advance of the issuance of applicable regulations thereunder shall be treated as compliance with such provisions. Sec. 402. Enhanced Conflict of Interest Provisions. (a) Prohibition on Personal Loans to Executives. Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m), as amended by this Act, is amended by adding at the end the following: “(k) Prohibition on Personal Loans to Executives. “(1) IN GENERAL—It shall be unlawful for any issuer (as defined in section 2 of the Sarbanes-Oxley Act of 2002), directly or indirectly, including through any subsidiary, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of that issuer. An extension of credit maintained by the issuer on the date of enactment of this subsection shall not be subject to the provisions of this subsection, provided that there is no material modification to any term of any such extension of credit or any renewal of any such extension of credit on or after that date of enactment. “(2) LIMITATION—Paragraph (1) does not preclude any home improvement

and manufactured home loans (as that term is defined in section 5 of the Home Owners' Loan Act (12 U.S.C. 1464)), consumer credit (as defined in section 103 of the Truth in Lending Act (15 U.S.C. 1602)), or any extension of credit under an open end credit plan (as defined in section 103 of the Truth in Lending Act (15 U.S.C. 1602)), or a charge card (as defined in section 127(c)(4)(e) of the Truth in Lending Act (15 U.S.C. 1637(c)(4)(e)), or any extension of credit by a broker or dealer registered under section 15 of this title to an employee of that broker or dealer to buy, trade, or carry securities, that is permitted under rules or regulations of the Board of Governors of the Federal Reserve System pursuant to section 7 of this title (other than an extension of credit that would be used to purchase the stock of that issuer), that is— "(A) made or provided in the ordinary course of the consumer credit business of such issuer; "(B) of a type that is generally made available by such issuer to the public; and "(C) made by such issuer on market terms, or terms that are no more favorable than those offered by the issuer to the general public for such extensions of credit. "(3) Rule of Construction for Certain Loans— Paragraph (1) does not apply to any loan made or maintained by an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), if the loan is subject to the insider lending restrictions of section 22(h) of the Federal Reserve Act (12 U.S.C. 375b)." Sec. 403. Disclosures of Transactions Involving Management and Principal Stockholders. (a) Amendment. Section 16 of the Securities Exchange Act of 1934 (15 U.S.C. 78p) is amended by striking the heading of such section and subsection (a) and inserting the following: "Sec. 16. Directors, Officers, and Principal Stockholders. "(a) Disclosures Required. "(1) DIRECTORS, OFFICERS, AND PRINCIPAL STOCKHOLDERS REQUIRED TO FILE—Every person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which is registered pursuant to section 12, or who is a director or an officer of the issuer of such security, shall file the statements required by this subsection with the Commission (and, if such security is registered on a national securities exchange, also with the exchange). "(2) Page B-7TIME OF FILING— The statements required by this subsection shall be filed— "(A) at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 12(g); "(B) within 10 days after he or she becomes such beneficial owner, director, or officer; "(C) if there has been a change in such ownership, or if such person shall have purchased or sold a security-based swap agreement (as defined in section 206(b) of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note)) involving such equity security, before the end of the second business day following the

day on which the subject transaction has been executed, or at such other time as the Commission shall establish, by rule, in any case in which the Commission determines that such 2-day period is not feasible. “ (3) CONTENTS OF STATEMENTS—A statement filed— “(A) under subparagraph (A) or (B) of paragraph (2) shall contain a statement of the amount of all equity securities of such issuer of which the filing person is the beneficial owner; and “(B) under subparagraph (C) of such paragraph shall indicate ownership by the filing person at the date of filing, any such changes in such ownership, and such purchases and sales of the security-based swap agreements as have occurred since the most recent such filing under such subparagraph. “(4) ELECTRONIC FILING AND AVAILABILITY—Beginning not later than 1 year after the date of enactment of the Sarbanes-Oxley Act of 2002— “(A) a statement filed under subparagraph (C) of paragraph (2) shall be filed electronically; “(B) the Commission shall provide each such statement on a publicly accessible Internet site not later than the end of the business day following that filing; and “(C) the issuer (if the issuer maintains a corporate website) shall provide that statement on that corporate website, not later than the end of the business day following that filing.” (b) Effective Date. The amendment made by this section shall be effective 30 days after the date of the enactment of this Act. Sec. 404. Management Assessment of Internal Controls. (a) Rules Required. The Commission shall prescribe rules requiring each annual report required by section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) to contain an internal control report, which shall— (1) state the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and (2) contain an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting. (b) Internal Control Evaluation and Reporting. With respect to the internal control assessment required by subsection (a), each registered public accounting firm that prepares or issues the audit report for the issuer shall attest to, and report on, the assessment made by the management of the issuer. An attestation made under this subsection shall be made in accordance with standards for attestation engagements issued or adopted by the Board. Any such attestation shall not be the subject of a separate engagement. Sec. 802. Criminal Penalties for Altering Documents. (a) In General. Chapter 73 of title 18, United States Code, is amended by adding at the end the following: “Sec. 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy “Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes

a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both. “Sec. 1520. Destruction of corporate audit records “(a) (1) Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies, shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded. “(2) Page B-8The Securities and Exchange Commission shall promulgate, within 180 days, after adequate notice and an opportunity for comment, such rules and regulations, as are reasonably necessary, relating to the retention of relevant records such as workpapers, documents that form the basis of an audit or review, memoranda, correspondence, communications, other documents, and records (including electronic records) which are created, sent, or received in connection with an audit or review and contain conclusions, opinions, analyses, or financial data relating to such an audit or review, which is conducted by any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies. The Commission may, from time to time, amend or supplement the rules and regulations that it is required to promulgate under this section, after adequate notice and an opportunity for comment, in order to ensure that such rules and regulations adequately comport with the purposes of this section. “(b) Whoever knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), shall be fined under this title, imprisoned not more than 10 years, or both. “(c) Nothing in this section shall be deemed to diminish or relieve any person of any other duty or obligation imposed by Federal or State law or regulation to maintain, or refrain from destroying, any document.” Sec. 804. Statute of Limitations for Securities Fraud. (a) In General. Section 1658 of title 28, United States Code, is amended— (1) by inserting “(a)” before “Except”; and (2) by adding at the end the following: “(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of— “(1) 2 years after the discovery of the facts constituting the violation; or “(2) 5 years after such violation.” (b) Effective

Date. The limitations period provided by section 1658(b) of title 28, United States Code, as added by this section, shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment of this Act. (c) No Creation of Actions. Nothing in this section shall create a new, private right of action. Sec. 806. Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud. (a) In General. Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following: “Sec. 1514A. Civil action to protect against retaliation in fraud cases “(a) Whistleblower Protection for Employees of Publicly Traded Companies. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee— “(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by— “(A) a Federal regulatory or law enforcement agency; “(B) any Member of Congress or any committee of Congress; or “(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or “(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. Page B-9“(b) Enforcement Action. “(1) IN GENERAL—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by— “(A) filing a complaint with the Secretary of Labor; or “(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. “(2) PROCEDURE— “(A) IN GENERAL—

An action under paragraph (1) (A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code. “(B) EXCEPTION—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer. “(C) BURDENS OF PROOF—An action brought under paragraph (1) (B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code. “(D) STATUTE OF LIMITATIONS—An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs. “(c) Remedies. “(1) IN GENERAL—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole. “(2) COMPENSATORY DAMAGES—Relief for any action under paragraph (1) shall include— “(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination; “(B) the amount of back pay, with interest; and “(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. “(d) Rights Retained by Employee. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.” (b) Clerical Amendment. The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by inserting after the item relating to section 1514 the following new item: “1514A. Civil action to protect against retaliation in fraud cases.” Sec. 807. Criminal Penalties for Defrauding Shareholders of Publicly Traded Companies. (a) In General. Chapter 63 of title 18, United States Code, is amended by adding at the end the following: “Sec. 1348. Securities fraud “Whoever knowingly executes, or attempts to execute, a scheme or artifice— “(1) to defraud any person in connection with any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); or “(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); shall be fined under this title, or imprisoned not more than 25 years, or both.” Sec. 906. Corporate Responsibility for Financial Reports. (a) In General. Chapter 63 of title 18, United States Code, is amended by inserting after section 1349, as created by this Act, the following: “Sec. 1350. Failure of corporate officers to

certify financial reports “(a) Certification of Periodic Financial Reports. Each periodic report containing financial statements filed by an issuer with the Securities Exchange Commission pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a) or 78o(d)) shall be accompanied by a written statement by the chief executive officer and chief financial officer (or equivalent thereof) of the issuer. Page B-10 “(b) Content. The statement required under subsection (a) shall certify that the periodic report containing the financial statements fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act pf 1934 (15 U.S.C. 78m or 78o(d)) and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer. “(c) Criminal Penalties. Whoever— “(1) certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $1,000,000 or imprisoned not more than 10 years, or both; or “(2) willfully certifies any statement as set forth in subsections (a) and (b) of this section knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $5,000,000, or imprisoned not more than 20 years, or both.” (b) Clerical Amendment. The table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by adding at the end the following: “1350. Failure of corporate officers to certify financial reports.”

Glossary A absolute privilege A special right, immunity, permission, or benefit given to certain individuals that allows them to make any statements about someone without being held liable for defamation for any false statement made, regardless of intent or knowledge of the falsity of the claim. acceptance A key factor in the agreement element of a contract; consists of the agreement of one party, the offeree, to the terms of the offer in the contract made by the other party, the offeror. acceptor A person (drawee) who accepts and signs a draft to agree to pay the draft when it is presented. accommodation party A party who signs an instrument to provide credit for another party who has also signed the instrument. accord and satisfaction An arrangement between contracting parties whereby one of the parties substitutes a different performance for their original duty under the contract. accredited investor A private investor who is allowed to accept private

securities offerings under certain specific guidelines the SEC sets. actual cause The determination that the defendant’s breach of duty resulted directly in the plaintiff’s injury. actual malice In defamation, either a person’s knowledge that their statement or published material is false or the person’s reckless disregard for whether it is false. actual notice Notice of agency termination that is given by directly informing third parties, either orally or in writing. actus reus Latin for “guilty act”; a wrongful behavior that is associated with the physical act of a declared crime. ad substantiation An FTC standard requiring advertisers to have a reasonable basis for the claims made in their ads. adhesion contract A contract created by a party to an agreement that is presented to the other party on a take-it-or-leave-it basis. Such contracts are legal but are sometimes rescinded on the grounds of unconscionability and the absence of one party’s free will to enter a contract. administrative agency Any government body created by the legislative branch (e.g., Congress, a state legislature, or a city council) to carry out specific duties. administrative law The collection of rules and decisions made by administrative agencies to fill in particular details missing from constitutions and statutes. administrative law judge (ALJ) A judge who presides over an administrative hearing; may attempt to get the parties to settle but has the power to issue a binding decision. Administrative Procedures Act (APA) Federal legislation that places limitations on how agencies are run and contains very specific guidelines on rule making by agencies. admission A statement made in court, under oath, or at some stage during a legal proceeding in which a party against whom charges have been brought admits that an oral contract existed, even though the contract was required to be in writing. adverse possession An involuntary property transfer in which a person acquires ownership of property by treating a piece of real property as their own, without protest or permission from the owner. affirm An appellate court decision that accepts a lower court’s judgment in a case that has been appealed. after-acquired property Property acquired by a debtor after the security arrangement is made. Age Discrimination in Employment Act (ADEA) of 1967 Federal law that prohibits employers from refusing to hire, discharging, or discriminating in terms and conditions of employment on the basis of an employee or applicant being age 40 or older. agency The fiduciary relationship that arises when one person consents to have another act on their behalf and subject to their control and the other consents to do so. agency by ratification An agency relationship that arises when an individual misrepresents themself as an agent for another party and that party accepts the unauthorized act. agency coupled with an interest An agency relationship that is created for the benefit of the agent, not the

principal. agency relationship The association between one party and an agent who acts on behalf of that party. agent A party who has the authority to act on behalf of and bind another party. agreement One of the four elements necessary for a contract; consists of an offer made by one party, the offeror, and the acceptance of the offer by another party, the offeree. alien corporation A business that is incorporated in a foreign country. allonge Accompanying a negotiable instrument, a piece of paper that provides room for an endorsement if no room is available on the instrument itself. alteration An unauthorized change to an instrument that modifies the obligation of a party to the instrument. alternative dispute resolution (ADR) The resolution of legal problems through methods other than litigation. Americans with Disabilities Act (ADA) Federal law that prohibits discrimination against employees and job applicants with disabilities. answer The response of the defendant to the plaintiff's complaint. apparent agency An agency relationship created by operation of law when one party, by their actions, causes a third party to believe someone is their agent when that person actually has no authority. Also called agency by estoppel. Page G-2 appellate court A higher court, usually consisting of more than one judge, that reviews the decision and results of a lower court (either a trial court or a lower-level appellate court) when a losing party files for an appeal. Appellate courts do not hold trials but may request additional oral and written arguments from each party; they issue written decisions, which collectively constitute case law or the common law. Also called court of appellate jurisdiction. arbitration A type of alternative dispute resolution in which disputes are submitted for resolution to private nonofficial persons selected in a manner provided by law or the agreement of the parties. arraignment The first appearance in court by the defendant, at which the defendant is advised of the pending charges, the right to counsel, and the right to trial by jury and they enter a plea to the charge. arrest The action in which a police officer or a person acting under the law takes a person into custody. articles of incorporation A document that contains basic information about a corporation and is filed with the state. articles of partnership The written agreement that creates the partnership. assault A civil wrong that occurs when one person intentionally and voluntarily places another in fear or apprehension of an immediate, offensive physical harm. Assault does not require actual contact. assignee In a contract, the party who receives the rights of another party (an assignor) to collect what was contractually agreed on in the original contract. assignment A contracting party's transfer of their rights to a contract to a third party. assignor In a contract, the party who transfers their rights to the contract to a third party (an assignee), giving the assignee the right to

collect what was contractually agreed on in the original contract. assumption of the risk A defense whereby the defendant must prove that the plaintiff voluntarily assumed the risk the defendant caused. attachment The point at which a creditor becomes the secured party that has a security interest in the collateral. automatic stay After bankruptcy has been filed, a moratorium during which creditors cannot bring or continue action against the debtor or their property. B bail A thing of value, such as a money bail bond or any other form of property, that is given to the court to allow a person’s temporary release from jail and to ensure their appearance in court. bait-and-switch advertising A deceptive practice in which a seller advertises a low-priced item, generally unavailable to the consumer, and then pushes the consumer to buy a more expensive item. Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005 A renovation in the system of bankruptcy enacted to address increased numbers of bankruptcy filings, significant losses associated with bankruptcy filings, loopholes and incentives that allowed for abuse, and the financial ability of debtors. bankruptcy estate The assets that are collected from a debtor who files for bankruptcy. bargain and sale deed A legal document that guarantees only that the seller holds title to the property. battery A civil wrong that occurs when one person intentionally and voluntarily brings about a nonconsented harmful or offensive contact with a person or something closely associated with them. Battery requires an actual contact. bearer instrument An instrument payable to cash or to whoever is in possession of the instrument. bench trial A trial before a judge, with the judgment decided by the judge rather than a jury; occurs when the defendant has waived their right to a jury trial. beneficiary A person who can expect to benefit from a relationship. bilateral contract A promise exchanged for a promise. binding arbitration clause A contract provision mandating that all disputes arising under the contract must be settled by arbitration. blank endorsement A payee’s or last endorsee’s signature on a negotiable instrument. blue-sky law A law that regulates the offering and sale of purely intrastate securities. booking After an individual is arrested, the procedure during which the name of the defendant and the alleged crime are recorded in the investigating agency’s or police department’s records. bounty payment A government reward for an act that is beneficial to the public. bribery A corrupt and illegal activity in which a person offers, gives, solicits, or receives money, services, or anything of value to gain an illicit advantage. brief A written legal argument, which a party presents to a court, that explains why that party to the case should prevail. burden of proof The duty of the plaintiff or prosecution to establish a claim or allegation by admissible evidence and to prove that the defendant committed all the essential

elements of the crime to the jury’s or court’s satisfaction beyond any reasonable doubt, in order to convict the defendant. business ethics The use of ethics and ethical principles to solve business dilemmas. business law The enforceable rules of conduct that govern the actions of buyers and sellers in market exchanges. business trust A business organization governed by a group of trustees, who operate the trust for beneficiaries. buyer in the ordinary course of business A person who routinely buys goods in good faith from a person who routinely sells such goods. bylaws Rules and regulations that govern a corporation’s internal management. C capacity The legal ability to enter into a binding contract. case law The collection of legal interpretations made by judges. They are considered to be law unless otherwise revoked by a statutory law. Also known as common law. Page G-3 case or controversy A term used in the U.S. Constitution to describe the structure and requirements of conflicting claims of individuals that can be brought before a federal court for resolution. A case or controversy requires an actual dispute between parties over their legal rights that remains in conflict at the time the case is presented and that is a proper matter for judicial determination. Also referred to as justifiable controversy. cash tender offer A type of takeover in which the aggressor corporation offers to pay the target shareholders cash for their stock. cashier’s check A check for which both drawer and drawee are the same bank. cease-and-desist order An FTC order requiring that a company stop its illegal behavior. certificate of deposit A document whereby a bank promises to pay a payee a certain amount of money at a future time. certificate of incorporation A document certifying that a corporation is incorporated in the state and is authorized to conduct business. certified check A check that is accepted by the bank from which the funds are drawn. chain-style business operation A type of franchise in which the franchise operates under the franchisor’s business name and is required to follow the franchisor’s standards and methods of business operation. chattel paper A writing that indicates both a monetary obligation and a security interest in specific goods. check A special draft that orders a bank (the drawee) to pay a specified sum of money to the payee from the drawer’s account. civil law The body of laws that govern the rights and responsibilities either between persons or between persons and their government. closely held corporation A corporation that does not sell stock to the general public. collateral The property that is subject to a secured interest. collective bargaining The process whereby workers organize collectively and bargain with employers regarding the workplace. commerce clause Clause 3 of Article I, Section 8, of the U.S. Constitution, which authorizes Congress to “regulate Commerce with foreign Nations, and among

the several States, and with the Indian Tribes.” commercial reasonableness Reasonable commercial standards of fair dealing, required of merchants in addition to honesty in fact. commercial speech Speech made by businesses about commercial matters, such as the sale of goods and services. It is protected by the First Amendment. common stock Corporate stock that does not convey any preferences to its holders. common-carrier delivery contract A type of contract in which purchased goods are delivered to the buyer via an independent contractor, such as a trucking line. compensatory damages Money awarded to a plaintiff as reimbursement for their losses; based on the amount of actual damage or harm to property, lost wages or profits, pain and suffering, medical expenses, disability, and so on. complaint A formal written document that begins a civil lawsuit; contains the plaintiff’s list of allegations against the defendant along with the damages the plaintiff seeks. complete performance Contract performance that occurs when all aspects of the parties’ duties under the contract are carried out perfectly. computer crime Crime committed using a computer. concealment The active hiding of the truth about a material fact. concurrent conditions In a contract, terms under which each party’s performance is conditioned on the performance of the other; occur only when the parties are required to perform for each other simultaneously. condemnation The legal process by which a transfer of property is made against the protest of the property owner. condition precedent In a contract, an event that must occur for a party’s duty to arise. condition subsequent In a contract, a future event that terminates the obligations of the parties when it occurs. conditional contract A contract that becomes enforceable only on the happening or termination of a specified condition. conditional estate An ownership interest in which the holder has the same interest as that in a fee simple absolute except that this interest is subject to a condition. conditional privilege A special right, immunity, permission, or benefit given to certain individuals that allows them to make any statements about someone without being held liable for defamation for any false statement made without actual malice. conditional sales contract A type of contract in which the sale itself is contingent on approval; can be either a sale-on-approval contract or a sale-or-return contract. conforming goods Goods that conform to contract specifications. consent order A statement in which a company agrees to stop disputed behavior but does not admit that it broke the law. consequential damages In a contract, foreseeable damages that result from special facts and circumstances arising outside the contract itself. The damages must be within the contemplation of the parties at the time the breach occurs. Also called special damages. consideration The bargained-for exchange; what each party gets in exchange for their

promise under a contract. Consolidated Omnibus Budget Reconciliation Act (COBRA) Federal law that ensures that when employees lose their jobs or have their hours reduced to a level at which they would not be eligible to receive medical, dental, or optical benefits from their employer, the employees will be able to continue receiving benefits under the employer's policy for up to 18 months by paying the premiums for the policy. constitutional law The general limits and powers of a government as interpreted from its written constitution. constructive notice Notice of agency termination that is usually given by publishing an announcement in a newspaper. constructive trust An equitable trust imposed on a person who wrongfully obtains or holds legal right to property they should not possess. Page G-4 consumer good A good used or bought for use primarily for personal, family, or household purposes. consumer law A statute or administrative rule serving to protect consumer interests. contract A promise or set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes a duty. contract clause The clause in the U.S. Constitution that prohibits the government from unreasonably interfering with an existing contract. contract under seal A contract that has a seal certifying its legality. Such contracts require no consideration for them to be legal. contractual capacity The legal ability to enter into a binding agreement. contributory negligence A defense to negligence whereby the defendant can escape all liability by proving that the plaintiff failed to act in a way that would protect him or her from an unreasonable risk of harm and that the plaintiff's negligent behavior contributed in some way to the plaintiff's accident. conversion Permanent interference with another's use and enjoyment of their personal property. cooperative An organization formed by individuals to market new products. Individuals in a cooperative pool their resources to gain an advantage in the market. copyright The protection of the expression of a creative work; that is, protection of the fixed form that expresses the ideas. corporation A legal entity formed by issuing stock to investors, who are the owners of the corporation. corporation by estoppel A defective corporation that has conducted business with a third party and therefore cannot deny its status as a corporation to escape liability. corrective advertising Advertising in which the company explicitly states that formerly advertised claims were untrue. Also called counteradvertising. cost-benefit analysis An economic school of jurisprudence in which all costs and benefits of a law are given monetary values. Laws with the highest ratios of benefits to costs are then preferable to those with lower ratios. counterclaim A claim made by the defendant against the plaintiff that is filed along with the defendant's answer. course of

dealing Previous commercial transactions between the same parties. course of performance The history of dealings between the parties in the particular contract at issue. covenant not to compete An agreement not to compete against a party for a set period of time within a designated geographic area. cover A buyer’s right to substitute goods for those due under a sales or lease agreement when the seller provides nonconforming goods. creditor An entity to which a debtor owes money. creditor beneficiary A third party who benefits from a contract in which the promisor agrees to pay the promisee’s debt. creditors’ meeting A meeting of all the creditors listed in the Chapter 7 required schedule for liquidation. criminal law The body of laws that involve the rights and responsibilities an individual has with respect to the public as a whole. critical thinking in the legal context Examining a legal opinion to search for potential problems in the reasoning. critical-thinking skills The ability to understand the structure and worth of an argument by evaluating the facts, issue, reasons, and conclusion of that argument. cross-licensing An illegal contractual arrangement in which two or more parties license each other to use their specified intellectual property only on the condition that neither licenses anyone else to use the property without the other’s consent. cure A breaching party’s right to provide conforming goods when nonconforming goods were initially delivered; subject to a reasonable time test. cyber terrorist A hacker whose intention is the exploitation of a target computer or network to create a serious impact, such as the crippling of a communications network or the sabotage of a business or organization, which may have an impact on millions of citizens if the terrorist’s attack is successful. D de facto corporation Latin for “corporation in fact;” a corporation that has not substantially met the requirements of the state incorporation statutes. de jure corporation Latin for “lawful corporation;” a corporation that has met the mandatory statutory provisions and thus received its certificate of incorporation. debt securities Securities that represent loans to a corporation. debtor A party that owes money to another party. defamation A false statement or an action that harms the reputation or character of an individual, business, product, group, government, or nation. default Failure to make payments on a loan. default judgment Judgment for the plaintiff that occurs when the defendant fails to respond to the complaint. defective corporation A corporation about which an error or omission was made during its incorporation process. defendant The person or party against whom a civil or criminal lawsuit is filed in a court of law. delegatee A third party who is not part of the original contract but to whom duties to perform are transferred by one of the contracting parties (a delegator). delegation A contracting party’s (a delegator’s) transfer of their

duty to perform to a third party who is not part of the original contract (a delegatee). delegator A party in a contract who transfers their duties to perform to a third party who is not part of the original contract (a delegatee). demand instrument A type of draft that allows the payee to demand payment at any time from a holder. deposition A pretrial sworn and recorded testimony of a witness that is acquired out of court with no judge present. digital cash Money stored electronically in place of physical currency. Page G-5 directed verdict A ruling by the judge, after the plaintiff has put forward their case but before any evidence is put forward by the defendant, in favor of the defendant because the plaintiff has failed to present the minimum amount of evidence necessary to establish their claim. discharge A written federal court order signed by a bankruptcy judge stating that the debtor is immune from creditor actions to collect debt; that is, a release from liability. discharged Released from liability for a negotiable instrument. disclosed principal A principal whose identity is known to a third party. The third party is aware that the agent is making an agreement on behalf of the principal. discovery The pretrial phase in a lawsuit during which each party requests relevant documents and other evidence from the other side in an attempt to "discover" pertinent facts and avoid any surprises in the courtroom during the trial. Discovery tools include requests for admissions, interrogatories, depositions, requests for inspection, and document production requests. dishonored Refused; specifically, a payment that has been refused despite a holder presenting an instrument in a timely and proper manner. disparagement A business tort that occurs when a statement is intentionally used to defame a business product or service. disparate impact A form of discrimination that arises when an employer's policy or practice appears to apply to everyone equally but its actual effect is that it disproportionately limits employment opportunities for a protected class. disparate treatment A form of intentional discrimination in which an employee is hired, fired, denied a promotion, or the like, based on membership in a protected class. This is a form of intentional discrimination. dissolution The first stage in the termination of a partnership. distributorship A type of franchise in which the franchisor manufactures a product and licenses a dealer to sell the product in an exclusive territory. dividend A distribution of corporate profits or income ordered by the directors and paid to the shareholders. domestic corporation A corporation in the state in which it is incorporated. donee beneficiary A third party who benefits from a contract in which a promisor agrees to give a gift to the third party. dormant commerce clause A restriction on states' authority that is implied in the commerce clause of the U.S. Constitution: The power given to Congress to enact legislation that affects interstate

commerce in effect prohibits a state from passing legislation that improperly burdens interstate commerce. draft An instrument validating an order by a drawer to a drawee to pay a payee. drawee The party that must obey an order. In the context of banking, the drawee is the bank that must pay the funds ordered by a customer’s check. drawer The party that writes an order or the person who writes a check. due diligence defense A defense in which the defendant argues that they applied the appropriate degree of attention, care, and research expected of a party in a given situation and had reasonable grounds to believe that certain facts and statements were accurate and had no omission of material facts. due process clause A clause in the Fifth Amendment of the U.S. Constitution providing that the government cannot deprive an individual of life, liberty, or property without a fair and just hearing. durable power of attorney A document that specifies that an agent’s authority is intended to continue beyond the principal’s incapacitation. duress Any unlawful act or threat exercised on a person whereby the person is forced to enter into an agreement or to perform some other act against their will. duty of accounting An agent’s obligation to keep an accurate account of the transactions of money and property made on behalf of the principal. duty of cooperation A principal’s obligation to assist an agent in the performance of the agent’s duties and not to interfere with reasonable conduct of the agent. duty of loyalty An agent’s obligation to act in the interest of the principal. duty of notification An agent’s obligation to inform the principal of the agent’s actions on the principal’s behalf and of all relevant information. duty of obedience An agent’s obligation to follow the lawful instruction and direction of the principal. duty of performance An agent’s obligation to perform the duties specified in the agency agreement and to do so with reasonable skill and care. duty of reimbursement and indemnification A principal’s obligation to reimburse an agent for any expenses or losses incurred by the agent on the principal’s behalf. duty to compensate A principal’s obligation to pay an agent for their services. duty to provide safe working conditions A principal’s obligation to provide proper equipment, suitable premises, and a safe working environment in accordance with federal and state statutes. E e-money Electronic money. easement An irrevocable right to use some part of another’s land for a specific purpose without taking anything from it. Electronic Communications Privacy Act (ECPA) of 1986 Federal law that extended employees’ privacy rights to electronic forms of communication, including email and cellular phones; outlaws the intentional interception of electronic communications and the intentional disclosure or use of the information obtained through such interception. electronic fund transfer (EFT) The transfer of funds by an

electronic terminal, telephone, or computer. embezzlement A wrongful conversion of another’s funds or property by one who is lawfully in possession of those funds or that property. Employee Retirement Income Security Act (ERISA) Federal law that sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans. Page G-6 enabling legislation A statute that specifies the name, functions, and specific powers of an administrative agency and grants the agency broad powers for the purpose of serving the public interest, convenience, and necessity. endorsee One who receives an endorsement. endorser One who issues an endorsement. English rule A rule that states that the first assignee to give notice of assignment to the obligor is the party with rights to the contract. entrustment The transfer of goods to a merchant who ordinarily deals in that type of goods. If the merchant subsequently sells them to a good-faith third-party purchaser, the buyer acquires good title to the goods. equal dignity rule A rule requiring that contracts that would normally fall under the statute of frauds and need a writing if negotiated by the principal must be in writing even if negotiated by an agent. Equal Pay Act (EPA) of 1963 Federal law that prohibits an employer from paying workers of one gender less than the wages paid to employees of the opposite gender for work that requires equal skill, effort, and responsibility. equal protection clause A clause in the Fourteenth Amendment of the U.S. Constitution that prevents states from denying “the equal protection of the laws” to any citizen. This clause implies that all citizens are created equal. equity securities Securities that represent ownership in a corporation. establishment clause One of two provisions in the First Amendment of the U.S. Constitution that protect citizens’ freedom of religion. It prohibits (i) the establishment of a national religion by Congress and (ii) the preference of one religion over another or of religion over nonreligious philosophies in general. ethical dilemma A question about how one should behave that requires one to reflect on the advantages and disadvantages of the optional choices for various stakeholders. ethical guideline A simple tool that helps determine whether an action is moral. ethics The study and practice of decisions about what is good or right. exchange tender offer A type of takeover in which the aggressor corporation offers to exchange the target shareholders’ current stock for stock in the aggressor’s corporation. exculpatory clause A statement in a contract that frees one party (usually the drafter of the agreement) from all liability arising out of performance of the contract, generally based on factors such as consumer ignorance or a great deal of unexplained fine print that serve to deprive the less powerful party of a meaningful choice. executed A term

applied to a contract in which all of the terms have been fully performed. executive agency An agency that is typically located within the executive branch, under one of the cabinet-level departments. The agency head is appointed by the president with the advice and consent of the Senate. executory A term applied to a contract in which not all of the terms have been fully performed. express authority The authority of an agent that arises when the principal explicitly instructs the agent to do something. Also called actual authority. express condition A condition specifically and explicitly stated in a contract and usually preceded by words such as conditioned on, if, provided that, or when. express contract A contract in which all the terms are clearly set forth in either written or spoken words. express warranty Any description of a good's physical nature or its use, in either general or specific circumstances, that becomes part of a contract. expressed agency An agency created in a written or oral agreement. Also called agency by agreement. extortion A criminal offense in which a person obtains money, property, and/or services from another by wrongfully threatening or inflicting harm on the other's person, property, or reputation. Also called blackmail. F Fair Labor Standards Act (FLSA) Federal law requiring a minimum wage of a specified amount be paid to all employees in covered industries; also mandates that employees who work more than 40 hours in a week be paid no less than 1½ times their regular wage for all hours beyond 40 worked in a given week. fair-use doctrine The lawful use of a limited portion of another's work for purposes of criticism, comment, news reporting, teaching, scholarship, and research that does not reduce the commercial value of the protected property. False Claims Act An act that allows employees to sue employers on behalf of the federal government for fraud against the government. The employee retains a share of the recovery as a reward for their efforts. false pretense The illegal obtaining of another's property by making a materially false representation of an existing fact, with knowledge of the falsity of the representation and with the intent to defraud. Family and Medical Leave Act (FMLA) Federal act requiring employers to provide all eligible employees with up to 12 weeks of leave during any 12-month period for several family-related occurrences (e.g., birth of a child, care of a sick spouse). federal preemption A principle asserting the supremacy of federal legislation over state legislation when both pertain to the same matter. Federal Register The government publication in which an agency publishes each proposed rule, along with an explanation of the legal authority for issuing the rule and a description of how the public can participate in the rule-making process, and later publishes the final rule. federalism A system of government in which power is divided between a central authority and

constituent political units. fee simple absolute An ownership interest in which the holder has exclusive rights to ownership and possession of the land; the most comprehensive type of estate. Page G-7 felony A serious crime, such as murder, rape, or robbery, that is punishable by imprisonment for more than one year or by death. fictitious payee Someone having no right to payment. The UCC fictitious-payee rule governs the liability of companies and their endorsed checks: any check made out to a fictitious payee and endorsed must be honored and is not considered a forgery. fiduciary A person who has a duty to act primarily for another person's benefit. financing statement A document that lists the names and addresses of all the parties involved in the transaction, a description of the collateral, and the signature of the debtor. firm offer An offer made in writing and giving assurances that it will be irrevocable for not longer than three months despite a lack of consideration for the irrevocability. first appearance The initial appearance of an arrested individual before a judge who determines whether there was probable cause for the arrest. If the judge ascertains that probable cause did not exist, the individual is freed. first-assignment-in-time rule A rule that states that the first party granted the assignment is the party correctly entitled to the contractual right. food disparagement A tort that provides ranchers and farmers with a cause of action when someone spreads false information about the safety of a food product. for-profit corporation A corporation whose objective is to make a profit. foreign corporation A corporation in a state in which it conducts business but is not incorporated. forgery A criminal falsification by imitating, impersonating, or altering a real document with the intent to deceive or defraud. formal contract A contract that must have a special form or must be created in a specific manner. formal rule making A type of rule making that is used when legislation requires a formal hearing process with a complete transcript; consists of publication of the proposed rule in the Federal Register, a public hearing, publication of formal findings, and publication of the final rule if adopted. franchise A business arrangement between an owner of a trade name or trademark and a person who sells goods or services under the trade name or trademark. franchise agreement A contract whereby a company (the franchisor) grants permission (a license) to another entity (the franchisee) to use the franchisor's name, trademark, or copyright in the operation of a business and associated sale of goods in return for payment. franchisee The seller of goods or services under a trade name or trademark in a franchise. franchisor The owner of the trade name or trademark in a franchise. fraud An intentional deception that causes harm to another. fraud in the factum A liability defense available to a party who signs a negotiable instrument

without knowing that it is a negotiable instrument. fraudulent misrepresentation The tort that occurs when a misrepresentation is made with the intent to facilitate personal gain and with the knowledge that it is false. fraudulent misrepresentation A false representation of a material fact that is consciously false and is intended to mislead the other party. fraudulent transfer A transfer of property made with intent to defraud creditors or made for an amount significantly lower than the property's fair market value within two years of filing for bankruptcy. free-exercise clause A clause in the First Amendment of the U.S. Constitution that states that government (state and federal) cannot make a law "prohibiting the free exercise" of religion. This clause is interpreted to include absolute freedom to believe and freedom to act that may face state restriction. Freedom of Information Act (FOIA) Federal legislation that mandates and facilitates public access to government information and records, including records about oneself. Sensitive information (e.g., on national security) is excluded. full faith and credit clause The clause of the U.S. Constitution (Article IV, Section 1) mandating that each state must recognize, respect, and enforce the public records, legislative acts, and judicial decisions of the other states. future interest A person's present right to property ownership and possession in the future. G gambling An agreement in which a party pays consideration (money placed during bets) for the chance, or opportunity, to obtain an amount of money or property. general partnership A partnership in which the partners divide profits and management responsibility and share unlimited personal liability for the partnership's debts. general warranty deed A legal document in which the seller provides the maximum number of warranties to the buyer, protecting the buyer by pledging that the seller holds clear title to the property and there are no encumbrances, outstanding liens, or mortgages against it. good faith Honesty in fact. Good Samaritan statute A statute that exempts from liability a person, such as a physician passerby, who voluntarily renders aid to an injured person but negligently, but not unreasonably negligently, causes injury while rendering the aid. good title Title acquired from someone who already owns the goods free and clear. goods All physically existing things that are movable at the time of identification to the contract for sale. goods-in-bailment contract A type of contract in which the purchased goods are in some kind of storage under the control of a third party, such as a warehouseman. gratuitous agent An agent who acts without being paid for their services. gross negligence An action committed with extreme reckless disregard for the property or life of another person. H hacker A person who illegally accesses or enters another person's or a company's computer system to obtain information or to steal money.

half-truth Information that is true but is not complete. Page G-8 historical school A school of jurisprudence that uses traditions as the model for future laws and behavior. Also called tradition or custom. holder A party in possession of a negotiable instrument. holder in due course (HDC) An individual who acquires a negotiable instrument in good faith. hostile takeover A takeover to which the management of the target corporation objects. hybrid agency An agency that has characteristics of both executive and independent agencies. hybrid rule making A type of rule making that combines features of formal and informal rule making; consists of publication in the Federal Register, a written-comment period, and an informal public hearing with restricted cross-examination. I identification with the vulnerable A school of jurisprudence that holds that society should be fair. Particular attention is therefore paid to the poor, the ill, and the elderly. illusory promise A situation in which a party appears to commit to something but really has not committed to anything. It is not a promise and thus not consideration. implied authority The authority of an agent that arises by inference from the words and actions of the principal. implied condition A condition that is not specifically and explicitly stated but is inferred from the nature and language of the contract. implied contract A contract that arises not from words of agreement but from the conduct of the parties. implied warranty of fitness for a particular purpose An assurance, inferred in any UCC sale, whereby when a seller or lessor knows or has reason to know (1) why the buyer or lessee is purchasing or leasing the goods in question and (2) that the buyer or lessee is relying on him or her to make the selection, the buyer or lessee has an enforceable warranty if such assurance is false. implied warranty of merchantability An assurance, inferred in every sale unless clearly disclaimed, that merchantable goods will conform to a reasonable performance expectation. The purchaser must have purchased or leased the good from a merchant. implied warranty of trade usage An assurance, inferred in the context of certain UCC sales, depending on the circumstances, that can be created through a well-accepted course of dealing or trade usage. imposter rule A rule that holds that if one obtains a negotiable instrument by impersonating another and endorses it with the impersonated party’s signature, the loss falls on the drawer of the instrument. in pari delicto In equal fault. in personam jurisdiction The power of a court to require a party (usually the defendant) or a witness to come before the court. The court must have personal jurisdiction to enforce its judgments or orders against a party. In personam jurisdiction extends only to the state’s borders in the state court system and across the court’s geographic district in the federal system. in rem jurisdiction The power of a

court over the property or status of an out-of-state defendant when that property or status is within the court’s jurisdiction area. incidental beneficiary One who unintentionally gains a benefit from a contract between other parties. incorporator An individual who applies for incorporation on behalf of a corporation. independent agency An agency that is typically not located within a government department. It is governed by a board of commissioners, who are appointed by the president with the advice and consent of the Senate. independent contractor A person who is hired to perform a task for another but who is not the other’s employee. indictment Finding by the grand jury that there is adequate evidence to charge the defendant and bring him or her to trial. indivisible contract A contract that requires complete performance by both parties. industry guides Interpretations of consumer laws created by the FTC to encourage businesses to stop unlawful behavior. informal contract A contract that requires no formalities. informal rule making A type of rule making in which an agency publishes a proposed rule in the Federal Register, considers public comments, and then publishes the final rule. Also called notice-and-comment rule making. information A document, prepared by the prosecutor and presented to the magistrate, which demonstrates that there is enough evidence to charge the defendant and bring him or her to trial. injunction A court order either forcing a party to do something or prohibiting a party from doing something. innocent misrepresentation A false statement about a fact material to an agreement that the person who made the statement believed to be true. insider trading The illegal buying or selling of a corporation’s stock or other securities by corporate insiders, such as officers and directors, in breach of a fiduciary duty or some other relationship of trust and confidence, while in possession of material, nonpublic information about the security. insolvent debtor A debtor who cannot pay debts in a timely fashion. instrument A writing that serves as evidence of the right to payment of money. intellectual property Intangible property that is the product of one’s mind and not one’s hands. intended beneficiary A third party to a contract whom the contracting parties intended to benefit directly from their contact. intent The intended purpose or goal of an action, especially in a contract. intentional interference with contract The tort that occurs when someone intentionally takes an action that will cause a person to breach a contract that they have with another. intentional misrepresentation A false representation of a material fact made by a party who either knows or believes that the factual claim is false or knows that there is no basis for the assertion. Scienter is clear. intentional tort A civil wrong resulting from an intentional act committed on the person, property, or economic interest of

another. Intentional torts include assault, battery, conversion, false imprisonment, intentional infliction of emotional distress, trespass to land, and trespass to chattels. Page G-9 intermediate scrutiny A standard of review under which a law must be necessary to achieve a substantial, or important, government interest and it must be narrowly tailored to that interest. interpretive rule A rule that does not create any new rights or duties but is merely a detailed statement of an agency's interpretation of an existing law, including the actions a party is to take to be in compliance with the law. interrogatories A formal set of written questions that one party to a lawsuit asks the opposing party as part of the pretrial discovery process in order to clarify matters of evidence and help determine in advance what facts will be presented at any trial in the case. The questions must be answered in writing under oath or under penalty of perjury within a specified time. Also called requests for further information. Interstate Commerce Commission (ICC) The first federal administrative agency; created to regulate the anticompetitive conduct of railroads. J joint stock company A partnership agreement in which company members hold transferable shares, whereas all the goods of the company are held in the names of the partners. joint venture An association between two or more parties wherein the parties share profits and management responsibilities with respect to a specific project. judicial review The power of a court to review legislative and executive actions, such as a law or an official act of a government employee or agent, to determine whether they are constitutional. L lack of genuine assent A defense to the agreement of a contract in which the offeree claims that the offeror secured the agreement through improper means, such as duress, fraud, undue influence, or misrepresentation. Landrum-Griffin Act Federal legislation that primarily governs the internal operations of labor unions. It requires financial disclosures by unions, establishes penalties for financial abuses by union officials, and includes "Labor's Bill of Rights" to protect employees from their own unions. last-clear-chance doctrine A doctrine used by the plaintiff when the defendant establishes contributory negligence. If the plaintiff can establish that the defendant had the last opportunity to avoid the accident, the plaintiff may still recover, despite being contributorily negligent. law Rules of conduct in any organized society that are enforced by the governing authority of the community. lease A transfer of the right to possession and use of goods for a term in return for consideration. leasehold A possessory interest, but not an ownership interest, transferred by contract. legal object A purpose that does not violate a statute or public policy. legal realism A school of jurisprudence that holds that context must be considered as well as law. Context includes factors such as economic conditions and social conditions.

lessee A person who acquires the right to possession and use of goods under a lease. lessor A person who transfers the right to possession and use of goods under a lease. letter of credit A binding document that a buyer can request from a bank to guarantee that the payment for goods will be made to the seller. leveraged buyout (LBO) A takeover-resistance strategy in which a group within the target corporation buys all the corporate stock held by the public, thereby turning the company into a privately held corporation. liability without fault A legal term that imposes responsibility for damages regardless of the existence of negligence. Also called strict liability. license A revocable right to use another's property temporarily. life estate An ownership interest in which the holder has the right to possess the property until their death. limited liability company (LLC) An unincorporated business that is taxed like a partnership, with the members paying personal income taxes, and has the limited liability of a corporation. limited liability partnership (LLP) A partnership in which all the partners assume liability for any partner's professional malpractice to the extent of the partnership's assets. limited partnership (LP) A partnership consisting of at least one general partner and at least one limited partner in which the general partners assume all liability for the partnership's debts, and the limited partners assume no liability beyond their originally invested capital. liquidated damages Damages specified as a term of the contract, before a breach of contract occurs. liquidated debt Debt for which there is no dispute between the parties about the fact that money is owed and the amount of money owed. liquidation The process in which a debtor turns over all assets to a trustee. long-arm statute A statute that enables a court to obtain jurisdiction against an out-of-state defendant as long as the defendant has sufficient minimum contacts within the state, such as committing a tort or doing business in the state. M mailbox rule The principle that holds that an acceptance is valid when it is placed in the mailbox, whereas a revocation is effective only when received by the offeree. In some jurisdictions, the mailbox rule has been expanded to faxes. maker A person who has promised to pay a set sum to the holder of a promissory note or certificate of deposit. manufacturing arrangement A type of franchise in which the franchisor provides the franchisee with a formula or necessary ingredient to manufacture a product. Page G-10 material breach A substantial breach of a significant term or terms of a contract that excuses the nonbreaching party from further performance under the contract and gives the nonbreaching party the right to recover damages. med-arb A type of dispute resolution process in which both parties agree to start out in mediation and, if unsuccessful, to move on to arbitration. mediation A type of intensive

negotiation in which disputing parties select a neutral party to help facilitate communication and suggest ways for the parties to solve their dispute. mens rea Latin for “guilty mind”; the mental state accompanying a wrongful behavior. merchant Under the UCC, a person who regularly sells goods as their business or trade or employs people to sell those goods; anyone who works for a person selling those goods; or anyone who holds themself out as a “merchant” or a “dealer.” merger clause A clause in a written agreement within the statute of frauds that states that the written agreement accurately reflects the final, complete version of the agreement. minitrial A type of conflict resolution in which lawyers for each side present their arguments to a neutral adviser, who then offers an opinion as to what the verdict would be if the case went to trial. This decision is not binding. Miranda rights The rights that are read to an arrested individual by a law enforcement agent before the individual is questioned about the commission of a crime. mirror-image rule The principle that holds that the terms of the acceptance must mirror the terms of the offer; if the terms of the acceptance do not mirror the terms of the offer, no contract is formed, and the attempted acceptance is a counteroffer. misappropriation theory A theory of insider trading that holds that if an individual wrongfully acquires (misappropriates) and uses inside information for trading for their personal gain, that person is liable for insider trading. misdemeanor A crime that is less serious than a felony and is punishable by a fine and/or imprisonment for less than one year. misrepresentation An untruthful assertion by one of the parties about a material fact. mistake An erroneous belief about the facts of a contract at the time the contract is concluded. When a mistake occurs, legal assent is absent. mixed sale A contract that combines a good with a service or real estate. mock trial A contrived or imitation trial, with a jury recruited by a jury selection firm, that attorneys sometimes use in preparing for an actual trial to test theories, experiment with arguments, and try to predict the outcome of the real trial. model laws Laws created to account for the variability of laws among states. These laws serve to standardize the otherwise different interstate laws. Also called uniform laws. modified comparative negligence A defense accepted in some states whereby the defendant is not liable for the percentage of harm that they can prove is due to the plaintiff’s own negligence if the plaintiff’s negligence is responsible for less than 50 percent of the harm; if the defendant establishes that the plaintiff’s negligence caused more than 50 percent of the harm, the defendant has no liability. modify An appellate court decision that grants an alternative remedy in a case; rendered when the court finds that the decision of the lower court was correct but the remedy was not. motion An application by a party to a judge

or a court in a civil case requesting an order in favor of the applicant. motion for judgment on the pleadings In a civil case, a request made by either party, after pleadings have been entered, that asks a judge or a court to issue a judgment. motion for summary judgment In a civil case, a request made by either party that asks a judge or a court to promptly and expeditiously dispose of a case without a trial. Any evidence or information that would be admissible at trial under the rules of evidence, such as affidavits, interrogatories, depositions, and admissions, may be considered on a motion for summary judgment. A court may hold oral arguments or decide the motion on the basis of the parties' briefs and supporting documentation alone. motion to dismiss A request by the defendant that asks a judge or a court in a civil case to dismiss the case because even if all the allegations are true, the plaintiff is not entitled to any legal relief. Also called demurrer. movability The quality of a negotiable instrument that ensures it is mobile and available. multiple-product order A form of cease-and-desist order issued by the FTC that applies not only to a specified product but also to other products produced by the same firm. mutual mistake The result of an error by both parties about a material fact, that is, one that is important in the context of a particular contract. N National Labor Relations Board (NLRB) An administrative agency created by the Wagner Act to interpret and enforce the National Labor Relations Act. negligence Behavior that creates an unreasonable risk of harm to others. negligence per se A doctrine that allows a judge or jury to infer duty and breach of duty from the fact that a defendant violated a criminal statute that was designed to prevent the type of harm that the plaintiff incurred. negligent misrepresentation A false statement of material fact made by a party who thinks it is true but who would have known the truth about the fact had they used reasonable care to discover or reveal it. negligent tort A civil wrong that occurs when the defendant acts in a way that subjects other people to an unreasonable risk of harm (i.e., the defendant is careless, to someone else's detriment). Negligence claims are usually used to achieve compensation for accidents and injuries. negotiable instrument A written document signed by a person who makes an unconditional promise to pay a specific sum of money on demand or at a certain time to the holder of the instrument; an acceptable medium for exchanging value from one person to another. Page G-11 negotiation A bargaining process in which disputing parties interact informally to attempt to resolve their dispute. Also, the transfer of the rights to a negotiable instrument from one party to another. no-par shares Stock shares that do not have a par value. nolo contendere A plea in which the defendant does not admit guilt but agrees not to contest the charges.

nominal damages Monetary damages awarded to a plaintiff in a very small amount, typically $1 to $5, to signify that the plaintiff has been wronged by the defendant even though the plaintiff suffered no compensable harm. nondisclosure A failure to provide pertinent information about a projected contract. nonprofit corporation A corporation that operates for educational, charitable, social, religious, civic, or humanitarian purposes rather than to earn a profit. note A promise by the maker of the note to pay the payee of the note. novation In a contract, the substitution of a third party for one of the original parties; the duties remain the same under the contract, but one original party is discharged and the third party takes that original party's place. O obligee A contractual party who agreed to receive something from the other party. obligor A contractual party who agreed to do something for the other party. Occupational Safety and Health Act (OSHA) of 1970 Federal law that established the Occupational Safety and Health Administration, the agency responsible for setting safety standards under the act and enforcing the act through inspections and the levying of fines against violators. offer A key factor in the agreement element of a contract; consists of the terms and conditions set by one party, the offeror, and presented to another party, the offeree. Omnibus Crime Control and Safe Streets Act of 1968 Federal statute banning employers from listening to the private telephone conversations of employees or disclosing the contents of these conversations. Employers may ban personal calls and monitor calls for compliance as long as they discontinue listening to any conversation once they determine it is personal. option contract An agreement whereby the offeree gives the offeror a piece of consideration in exchange for the offeror's agreement to hold the offer open for the specified period of time. order A binding decision rendered by a judge. order instrument An instrument payable to a specific, named payee. order of relief An order stating that bankruptcy proceedings can continue. originalism The interpretation of legal texts such as the Constitution by relying on the words or intent of the creators of the text in question. P par-value shares Stock shares that have a fixed face value noted on the stock certificate. parol evidence rule A common law rule that states that oral evidence of an agreement made prior to or contemporaneously with a written agreement is inadmissible when the parties intend the written agreement to be the complete and final version of their agreement. partial performance An exception to the statute of frauds in which the performance of portions of an unwritten agreement by one or both parties can constitute proof that an oral contract exists between the parties. partially disclosed principal A principal whose identity is not known by a third party, although the third party is aware that the agent is making an agreement on behalf of a

principal. Also called unidentified principal. partnership A voluntary association between two or more people who co-own a business for profit. patent Protection that grants the holder the exclusive right to produce, sell, and use the object of the patent for 20 years; can be obtained for a product, process, invention, machine, or a plant produced by asexual reproduction. payee The party that receives the benefit of an order (check, etc.). peremptory challenge In a jury trial, the right of the plaintiff and the defendant in jury selection to reject, without stating a reason, a certain number of potential jurors who appear to have an unfavorable bias. perfect tender rule Requirement that the seller deliver the goods in conformity with the contract, down to the last detail. perfection The series of legal steps a secured party takes to protect its right in the collateral from the other creditors who want their debt returned through the same collateral. personal defense A liability defense that is not applicable to holders in due course. personal property Tangible, movable objects. petit jury A group of 6 or 12 citizens who are summoned to and sworn by the court to hear evidence presented by both sides and render a verdict in a trial. petty offense A minor crime that is punishable by a small fine and/or imprisonment for less than six months in a jail. plaintiff The person or party who initiates a lawsuit (also known as an action) before a court by filing a complaint with the clerk of the court against the defendant(s). Also known as claimant or complainant. plea bargain An agreement in which the prosecutor agrees to reduce charges, drop charges, or recommend a certain sentence if the defendant pleads guilty. pledge The transfer of collateral to the secured party. police power Power retained by each state to pass laws that protect the health, safety, and welfare of its citizens. policy statement A general statement about the directions in which an agency intends to proceed with respect to its rule-making or enforcement activities; has no binding impact on anyone. political speech Speech that is used to support political candidates or referenda. It is given a high level of protection by the First Amendment as compared to other types of speech. power of attorney A specific form of express authority that grants an agent specific powers. Page G-12 precedent A tool used by judges to make rulings on cases on the basis of key similarities to previous cases. preferential payment A payment made by an insolvent debtor that gives preferential treatment to one creditor over another. preferred stock Stock that conveys preferences to its holders with respect to assets and dividends. prejudicial error An error of law that is so significant that it affects the outcome of the case. prenuptial agreement An agreement two parties enter into before marriage that clearly states the ownership rights each party enjoys in the other party’s property. To be enforceable, the agreement must

be in writing. presentment The act of making a demand for the drawee to pay. presentment warranty A warranty covering the parties accepting an instrument for payment; created to ensure that the accepting or paying party is paying the proper party. pretrial conference An informal meeting of the judge with the attorneys representing the parties before the actual trial begins. primarily liable Liable for paying the amount designated on an instrument when it is presented for payment. principal The party that an agent’s authority can bind or act on behalf of. private corporation A corporation that is created by private persons and does not have government duties. private law Law that involves suits between private individuals or groups. private nuisance A nuisance that affects only a single person or a very limited number of individuals. private trial An ADR method in which a referee is selected and paid by the disputing parties to offer a legally binding judgment in a dispute. privileges and immunities clause Clause in the U.S. Constitution requiring a state to grant citizens of other states the same legal benefits that it grants its own citizens. probable cause Any essential element and/or standard by which a lawful officer may make a valid arrest, conduct a personal or property search, or obtain a warrant. procedural due process The requirement that a government must use fair procedures before depriving a person of their life, liberty, or property. procedural unconscionability Unconscionability that derives from the process of making a contract. proceeds Something that is exchanged for a debtor’s sold collateral. profit The right to go onto someone’s land and take part of the land or a product of it away from the land. promisee In a third-party beneficiary contract, the party to the contract who owes something to the promisor in exchange for the promise made to the third party. promisor In a third-party beneficiary contract, the party to the contract who made the promise that benefits the third party. promissory estoppel The legal enforcement of an otherwise unenforceable contract due to a party’s detrimental reliance on the contract. promoter A person who begins the corporate creation and organization process. prospectus A written document filed with the SEC that contains a description of a security and other financial information regarding the company offering the security; also distributed as an advertising tool to potential investors. proximate cause The extent to which, as a matter of policy, a defendant may be held liable for the consequences of their actions. In the majority of states, proximate cause requires the plaintiff and the plaintiff’s damages to have been foreseeable at the time of the accident. In the minority of states, proximate cause exists if the defendant’s actions led to the plaintiff’s harm. proxy A writing signed by a shareholder that authorizes the individual named in the writing to exercise

the shareholder’s votes (corresponding to their shares of stock) at a shareholders’ meeting. proxy solicitation The process of obtaining authority to vote on behalf of shareholders. public corporation A corporation that is created by government to help administer law. public figure privilege A special right, immunity, or permission given to people that allows them to make any statements about public figures, typically politicians and entertainers, without being held liable for defamation for any false statement made without malice. public law Law that involves suits between private individuals or groups and their government. publicly held corporation A corporation whose stock is available to the public. punitive damages Compensation awarded to a plaintiff that goes beyond reimbursement for actual losses and is imposed to punish the defendant and deter such conduct in the future. purchase-money security interest (PMSI) A security interest formed when a debtor uses borrowed money from the secured party to buy the collateral. pure comparative negligence A defense accepted in some states whereby the defendant is not liable for the percentage of harm that they can prove is due to the plaintiff’s own negligence. Q quasi-contract A court-imposed contractual obligation to prevent unjust enrichment. question of fact A question about an event or characteristic in a case. question of law An issue concerning the interpretation or application of a law. quitclaim deed A legal document offering no warranties and transferring only whatever interest the seller holds. R Racketeer Influenced and Corrupt Organizations (RICO) Act A U.S. law that provides extended penalties for criminal acts performed as part of an ongoing criminal organization. ratify To approve an unauthorized agent’s signature on an instrument. rational-basis test The lowest standard of review; requires a law to be designed to protect a legitimate state interest and be rationally related to that interest. Page G-13 reaffirmation agreement An agreement in which the debtor agrees to pay a debt even though it could have been discharged in bankruptcy. real defense A liability defense that applies universally to all parties. real property Land and everything permanently attached to it. reasonable person standard A measurement of the way members of society expect an individual to act in a given situation. recognizance An obligation in which a party acknowledges in court that they will perform some specified act and/or pay a price on failure to do so. red-herring prospectus A prospectus with a warning written in red print at the top of the page telling investors that the registration has been filed with the SEC but is not yet approved. reg-neg A type of rule making in which representatives of concerned interest groups and of the involved government agency participate in mediated bargaining sessions to reach an agreement, which is forwarded to the agency. relative permanence The

quality of a negotiable instrument that ensures its longevity. remand An appellate court decision that returns a case to the trial court for a new trial or for limited hearing on a specified subject matter; rendered when the court decides that an error was committed that may have affected the outcome of a case. reply A response by the plaintiff to the defendant’s counterclaim. request to produce documents In a lawsuit, the right of a party to examine and copy papers of the opposing party that are relevant to the case. A legal request may be made, and the categories of the documents must be stated to allow the other party to know what documents they must produce. res ipsa loquitur A doctrine that allows the judge or jury to infer that, more likely than not, the defendant’s negligence was the cause of the plaintiff’s harm, even though there is no direct evidence of the defendant’s lack of due care. rescind To cancel a contract. rescission The termination of a contract. respondeat superior Latin for “let the superior speak”; the principle by which liability for harm caused by an agent/employee is held by the principal/employer. Restatements of the Law Summaries of common law rules in a particular area of the law. Restatements do not carry the weight of law but can be used to guide interpretations of particular cases. restitution The return of any property given up under a contract. restricted securities Securities that have limited transferability and are usually issued in a private placement. retained earnings Profits that a corporation keeps. reverse An appellate court decision that overturns the judgment of a lower court, concluding that the lower court was incorrect and its verdict cannot be allowed to stand. right of first refusal A method of restricting stock transferability whereby a corporation or its shareholders have the right to purchase any shares of stock offered for resale by a shareholder within a specified time frame. ripeness The readiness of a case for a decision to be made. The goal is to prevent premature litigation for a dispute that is insufficiently developed. A claim is not ripe for litigation if it rests on contingent future events that may not occur as anticipated or may not occur at all. S S corporation A corporation that enjoys the tax status of a partnership. Sabbath laws Laws prohibiting the performance of certain activities on Sundays. sale The passing of title from a seller to a buyer for a price. sale-on-approval contract A contract in which the seller allows the buyer to take possession of the goods before deciding whether to complete the contract by making the purchase. sale-or-return contract A contract in which the buyer and seller agree that the buyer may return the goods at a later time. Sarbanes-Oxley Act An act that criminalizes specific nonaudit services when provided by a registered accounting firm to an audit client; also increases the punishment for a number of white-collar offenses. Also

known as the Public Company Accounting Reform and Investor Protection Act of 2002. scienter Intent or knowledge. search warrant A court order that authorizes law enforcement agents to search for or seize items specifically described in the warrant. secondarily liable Liable for paying the amount designated on an instrument if the primarily liable party defaults. secured interest An interest in personal property or fixtures that secures payment or performance to a creditor. secured party The party that holds the interest in a secured property. secured transaction A transaction in which the payment of a debt is guaranteed by personal property the debtor owns. security A financial instrument designated as a note, stock, or bond or any other instrument named in the Securities Act of 1933. security agreement An agreement in which the debtor gives the secured interest to the secured party. self-dealing Any instance in which directors or officers make decisions that violate their corporate duty of loyalty. self-tender offer A takeover-resistance strategy in which the target corporation offers to buy its shareholders' stock. service of process The procedure by which a court delivers a copy of the statement of claim or other legal documents, such as a summons, complaint, or subpoena, to the defendant. severable contract A contract that contains multiple parts that can each be performed separately. sexual harassment Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that makes submission a condition of employment or a factor in employment decisions or that creates an intimidating, hostile, or offensive work environment. The two types are hostile environment and quid pro quo. Page G-14 shadow jury An unofficial jury, provided by a jury selection firm, that sits in during the actual trial and deliberates at the end of each day to evaluate for the attorneys how each side is doing. shareholder's derivative suit A lawsuit filed by a shareholder on behalf of the corporation. shareholder's direct suit A lawsuit filed by a shareholder against the corporation. shareholders Investors in a corporation, who own the corporation. shelter principle The principle that when an item is transferred, the transferee acquires all the rights the transferor had to the item. short-swing profits Profits made from the sale of company stock within any six-month period by a statutory insider. signature liability Liability attributed because of a party's signature on an instrument. simple delivery contract Type of contract in which purchased goods are transferred to the buyer from the seller either at the time of the sale or at some time later by the seller's delivery. slander of quality A business tort that occurs when false spoken statements criticize a business product or service and result in a loss of sales. slander of title A business tort that occurs when false published statements are related to the ownership of the

business property. social responsibility of business The expectations that a community places on the actions of firms inside that community’s borders. sole proprietor The single person at the head of a sole proprietorship. sole proprietorship A business in which one person (sole proprietor) is in control of the management and profits. special endorsement An endorser’s signature accompanied by the name of the endorsee. special warranty deed A legal document in which the seller guarantees only that they have the title to the property and that the property was unencumbered during the time of the seller's ownership of it. specific performance An order of the court requiring a party to fulfill the terms of the contract. stakeholders The groups of people affected by a firm’s decisions. stale check A check that is not presented to a bank within six months of its date. standing The legal right of a party or an individual to bring a lawsuit by demonstrating to the court sufficient connection to and harm from the law or action challenged (i.e., the plaintiff has to demonstrate that they are harmed or will be harmed). Otherwise, the court will dismiss the case, ruling that the plaintiff “lacks standing” to bring the suit. stare decisis “Standing by the decision;” a principle stating that rulings made in higher courts are binding precedent for lower courts. statute of frauds State-level legislation that addresses the enforceability of contracts that fail to meet the requirements set forth in the statute; serves to protect promisors from poorly considered oral contracts by requiring certain contracts to be in writing. statutory insiders Certain large stockholders, executive officers, and directors who are deemed insiders by the Securities Exchange Act of 1934. statutory law The assortment of rules and regulations put forth by legislatures. stock certificate A document that serves as a stockholder’s proof of ownership in a corporation. stock warrant A type of security issued by a corporation (usually together with a bond or preferred stock) that gives the holder the right to purchase a certain amount of common stock at a stated price. stop-payment order An order by a drawer that instructs the drawee bank not to pay an issued check. stored-value card A plastic card that contains data regarding the value of the card, thereby allowing EFTs to be made. strict liability Liability in which responsibility for damages is imposed regardless of the existence of negligence. Also called liability without fault. strict scrutiny The most exacting standard of review used by the courts in determining the constitutionality of a statute; requires a compelling government interest and the least restrictive means of attaining that objective. strict-liability offense Offense for which no mens rea is required. strict-liability tort A civil wrong that occurs when the defendant takes an action that is inherently dangerous and cannot ever be undertaken safely, no matter what precautions the defendant takes. In such situations, a

defendant is liable for the plaintiff’s damages without any requirement for the plaintiff to prove that the defendant was negligent. subject-matter jurisdiction The power of a court over the type of case presented to it. subpoena duces tecum An order to appear and bring specified documents. subpoena An order to appear at a particular time and place and provide testimony. subscriber An investor who agrees to purchase stock in a new corporation. subscription agreement An agreement between promoters (persons raising capital for a new corporation) and subscribers (investors), in which the subscribers agree to purchase stock in the new corporation. substantial evidence Refers to evidence that a reasonable mind could accept as adequate to support a conclusion. It is defined as “more than a scintilla but less than preponderance” and consists of “such relevant evidence as a reasonable person would accept as adequate to support a conclusion.” substantial impairment A concept, used to modify the perfect tender rule, whereby a buyer can revoke acceptance of goods and, with installment contracts, a buyer/ lessee can reject an installment of a particular item only if the defects substantially impair the value of the goods. substantial performance Contract performance that occurs when nearly all the terms of the agreement have been met, there has been an honest effort to complete all the terms, and there has been no willful departure from the terms of the agreement. substantive due process The requirement for laws depriving an individual of life, liberty, or property to be fair and not arbitrary. substantive unconscionability Unconscionability that derives from one-sided, unjust, or overly harsh substance in a contract. Page G-15 summary jury trial An abbreviated trial that leads to a nonbinding jury verdict. summons A legal document issued by a court and addressed to a defendant that notifies him or her of the lawsuit and how and when to respond to the complaint. A summons may be used in both civil and criminal proceedings. supremacy clause Article VI, Paragraph 2, of the U.S. Constitution, which states that the Constitution and all laws and treaties of the United States constitute the supreme law of the land. Thus, any state or local law that directly conflicts with the U.S. Constitution or federal laws or treaties is void. syndicate An investment group that comes together for the explicit purpose of financing a specific large project. T Taft-Hartley Act Federal legislation designed to curtail some of the powers that unions had acquired under the Wagner Act; designates certain union actions as unfair. Also called Labor-Management Relations Act. takeover The purchase of one corporation’s stock by another corporation as a means of gaining control of the selling corporation. takings clause A clause in the Fifth Amendment of the U.S. Constitution requiring that when government uses its power to take private property for public use, it

must pay the owner just compensation, or fair market value, for the property. tender An offer by a party in a contract to perform, along with being ready, willing, and able to perform, a duty outlined in that contract. tender of delivery Requirement that the seller or lessor have and hold conforming goods at the disposal of the buyer or lessee and give the buyer or lessee reasonable notification to enable him or her to take delivery. tender offer A type of takeover in which the aggressor corporation offers the target shareholders a price above their stock's current market value. termination statement An amendment to a financing statement, which states that the debtor has no obligation to the secured party. third-party beneficiary contract A contract created when two parties enter into a contract agreement with the intended purpose of benefiting a third party. time instrument A type of draft that allows the payee to collect payment only at a specific time in the future. tippee An individual who receives confidential information from an insider. tipper An insider who gives inside information to someone. tipper/tippee theory A theory of insider trading that holds that any individual (tippee) who acquires material inside information as a result of an insider's (tipper's) breach of duty has engaged in insider trading. Title VII of the Civil Rights Act (CRA) of 1964 Federal law (amended by the Civil Rights Act of 1991) that protects employees against discrimination based on race, color, religion, national origin, and sex; also prohibits harassment based on the same protected categories. tombstone advertisement A print advertisement in a format similar to that of a tombstone that announces a forthcoming sale of securities. tort A violation of another person's rights or a civil wrongdoing that does not arise out of a contract or statute; primary types are intentional, negligent, and strict-liability torts. tortfeasor A person who commits an intentional or through-negligence tort that causes a harm or loss for which a civil remedy may be sought. trade dress The overall appearance and image of a product. trade libel A business tort that occurs when false printed statements criticize a business product or service and result in a loss of sales. trade secret A process, product, method of operation, or compilation of information that gives a businessperson an advantage over their competitors. trademark A distinctive mark, word, design, picture, or arrangement that is used by a producer in conjunction with a product and tends to cause consumers to identify the product with the producer. transfer warranty A warranty regarding a negotiable instrument and its transfer; created by a party who transfers the instrument. traveler's check An order that is payable on demand, is drawn on or through a bank, is designated by the phrase traveler's check, and requires a counter-signature by the person whose signature appears on the check. trespass to personal property

Temporary interference with another’s use or enjoyment of their personal property. trespass to realty A tort that occurs when someone goes on another’s property without permission or places something on another’s property without permission. trial court A court in which most civil or criminal cases start when they first enter the legal system. The parties present evidence and call witnesses to testify. Trial courts are referred to as courts of common pleas or county courts in state court systems and as district courts in the federal system. Also called court of original jurisdiction and court of first instance. trustee A person who operates a trust for beneficiaries in a business trust. In bankruptcy proceedings, an individual who takes over administration of a debtor’s estate. tying arrangement An illegal agreement in which the sale of one product is tied to the sale of another. U unconscionable A term applied to a contract in which one party has so much more bargaining power than the other party that the powerful party dictates the terms of the agreement and eliminates the other party’s free will. undisclosed principal A principal whose existence is not known by a third party. That is, the third party does not know an agent is acting on behalf of a principal. undue influence The situation in which one person has taken advantage of their dominant position in a relationship to persuade the other person unduly to the extent that the dominant person’s persuasive efforts have interfered with the other person’s ability to make their own decision. Page G-16 unemployment compensation A state system, created by the Federal Unemployment Tax Act (FUTA), that provides unemployment compensation to qualified employees who lose their jobs. unenforceable A term applied to a contract that, because of a law, cannot be enforced by the courts. unfair competition The act of competing with another not to make a profit but for the sole purpose of driving that other out of business. unforeseen circumstances Events that a reasonable person would not be expected to anticipate. Uniform Commercial Code (UCC) A statutory source of contract law in the United States applicable to transactions involving the sale of goods. The UCC was created in 1952 and adopted by all 50 states, the District of Columbia, and the Virgin Islands; it may be modified by each state to reflect the wishes of the state legislature. unilateral contract A promise exchanged for an act. unilateral mistake The result of an error by one party about a material fact, that is, one that is important in the context of a particular contract. United Nations Convention on Contracts for the International Sale of Goods (CISG) The legal structure for international sales, including business-to-business sales contracts. universalization test The ethical guideline that urges us to consider, before we act, what the world would be like if everyone acted in this way. unliquidated debt Debt for which

the parties either dispute the fact that any money is owed or agree that some money is owed but dispute the amount. usage of trade Any practice that members of an industry expect to be part of their dealings. usury The lending of money at an exorbitant or unlawful rate of interest. V valid A term applied to a contract that includes all four elements of a contract: agreement (offer and acceptance), consideration, contractual capacity, and legal object. values Positive abstractions that capture our sense of what is good and desirable. venue (1) The place where a hearing takes place. Its geographic location is determined by each state's statutes and based on where the parties live or where the event occurred or the alleged wrong was committed. (2) A legal doctrine relating to the selection of a court with subject-matter and personal jurisdiction that is the most appropriate geographic location for the resolution of the dispute. vest To mature, as in the maturation of rights that allow a party to act legally on the rights. vicarious liability The liability or responsibility imposed on a person, a party, or an organization for damages caused by another; most commonly used in relation to employment, with the employer held vicariously liable for damages caused by its employees. virus A computer program that rearranges, damages, destroys, or replaces computer data. void A term applied to a contract that is not valid because its object is illegal or it has some defect that is so serious that it is not a contract. void title Not true title; for example, the title held by someone who knowingly or unknowingly purchased stolen goods. voidable A term applied to a contract that one or both parties have the ability to either withdraw from or enforce. voidable title Title that occurs in situations in which the contract between the original parties would be void, but the goods have already been sold to a third party. voir dire The process of questioning potential jurors to ensure that the jury will be made up of unbiased individuals. W Wagner Act The first major piece of federal legislation adopted explicitly to encourage the formation of labor unions and provide for collective bargaining between employers and unions as a means of obtaining the peaceful settlement of labor disputes. warranty An assurance, either express or implied, by one party that the other party can rely on its representations of fact; in sales, a binding promise regarding a product in the event that the product does not meet the manufacturer's or seller's promises. warranty liability Liability attributed when the transfer of an instrument breaches a warranty associated with an instrument. warranty of title An assurance, inferred in every UCC sales transaction, that the seller has good and valid title to the goods and has the right to transfer title free and clear of any liens, judgments, or infringements of intellectual property rights of which the buyer does not have knowledge. watered stock Stock that

is issued to individuals below its fair market value. WH approach (to ethical decision making) A set of ethical guidelines that urges us to consider whom an action affects, the purpose of the action, and how we view its morality. white-collar crime A variety of nonviolent illegal acts against society that occur most frequently in the business context. winding up The second stage in the termination of a partnership. workers' compensation laws State laws that provide for financial compensation to employees or their dependents when a covered employee is injured on the job. writ of certiorari A Supreme Court order, issued after the Court decides to hear an appeal, mandating that the lower court send to the Supreme Court the record of the appealed case. writing A type of documentation that shows contractual intent and satisfies the statute of frauds requirement.

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